TO THE FONDATIONS OF COMPARATIVE PRIVATE INTERNATIONAL LAW

A Comparative Law Synthesis Theory v. Private Transnational Law as a New Conception in Private International Law

by

F. MADL

Professor of Law (University of Budapest, Faculty of Law)

I. Premilinary Remarks Conerning this Article and the Preexisting Conceptions

1. A new conception of private international law is gathering strength an spreading around: the conception of private transnational law. *Ehrenzweig* developped his *Specific Principles of Private Transnational Law* in America and came to Europe to lecture on them and to publish them in Netherlands, and more recently *E. Langen* (Germany) published a comprehensive monograph on *Transnational Commercial Law*.[1]

This writing has been brought about or, in the best sense of the word, rather provoked to a great extent by the ideas, new thougths, convincing and provoking arguments, confrontations of obsolate legal categories and the demands of recent developments in the field of international economic relations, which drive the wheels of this new conception. To meet the growing demands of the recent developments by more corresponding legal science answers, of course, quite an impressing writing has developed.[1/a] But here, in this article, we shall focus on that stream, which is, as we may witness, sailing under the flag of „transnational law", and which also invites, first, to combine this and other new conceptions into a general picture and, second, to develop a comprehensive conception, a comparative law sythesis theory as it is called iu the subtitle above.

As to transnational law, besides *Ehrenzweig's* „Specific Principles of Private Transnational Law" it is especially the comprehensive book of *Langen* by which the outspoken and thought-to-the-end features on the

one hand and the newness on the other hand are brought home to us. "This book, as it is put in the first sentence of the work, is based on a new conception of international commercial law" (p. IX). In these new conceptions, theories or principles we face the terms private transnational law or transnational commercial law; the present writing – when focusing on these problems – still carries the title: *A Comparative Law Synthesis Theory v. Private Transnational Law as a New Conception in Private International Law* under the assumption that the reason of this and also the juxtaposition of the terms "private transnational law", "private international law" and "transnational commercial law" will become, hopefully, clear till the end of this article.

As will be seen this writing is of course somewhat more than a review on one or two books. The first part *(II. The Thesis: The New Conception Summarized)* is meant to give a picture reliable as far as possible of the *new conception* in question. The second part *(III. Antithesis: Transnational Commercial Law – How Far is it New, why it is not a Law, and Other Counter-Arguments)* brings some of the arguments the *new conception*, the fortress of this system should be fortified against, arguments by virtue of which, I think, the limits and perspectives of this conception become more decidedly discernible. In the third part *(IV. A Tentative Synthesis:* a) *Realistic Theories Combined* to b) *a Comparative Law Synthesis Theory)* a conception is ventured to combine transnational law and other related theories into a general law-making theory in the field of comparative law, especially comparative private international law.

2. Are there new conceptions or theories still needed ? Are there peaks still to be climbed ? *Hilary* when asked upon what moral considerations he put so much at stake to climb the Mont Everest is said to have answered: "Because it was there". Because it was there, unclimbed, we may add. This was my question too when I ventured a kind of new theory on comparative private international law:[2] were there peaks or hills still unclimbed in this field of law ?[3].

And now when the question is raised on what considerations a state is admitting the application of the law of an other state within its territory by its courts, or how the solution of an international case should be mastered (what, at the end, the main concern of the transnational concept really is) – again lots of theories offer themselves. Let us have just a short glimpse at them. One of these is that has been called *neo-comity*. This theory as at one time the statutists permit the foreign soverign (its legal system) to implement his own claims in the other country on comity-considerations of the latter. In an other formulation *Savigny* called this a *freundliche Zulassung* (friendly admission). Even if it sounds differently, the same idea finds expression among modern authors, in *Eck*'s "international cooperation", in *Kahn-Freund*'s "growth of internationalism", or in *Schmitthoff*'s, opinion, according to which there are vested foreign rights, which deserve protection, or in another wording, namely in *Szászy*'s efforts to elevate coexistence to a principle of conflicts of law. Than there

are the theories of the new "law merchant" *(lex mercatoria)*, or the "*Rabel*'s *Entscheidungseinklang* (harmony of settlement) induced by intensive comparative law analyses to result in a gradual harmonization of decisions. When we turn to the American theories and conceptions, we find *Currie*'s "legitimate governmental interest", the "principles of preference" of *Cavers*, *Lefler*'s "choice-influencing considerations", the *Restatement Second* with its "most significant relationships" etc. And these are not all of them in the "Heaven of Concepts", im *Begriffshimmel* as *Ihering* called it, of the many concepts which were aimed at the solution of the aforesaid question. But these theories and concepts have been under heavy criticism in the more recent time, especially if we take, *e.g. Ehrenzweig's* critical statements againts pure theoretizing. *In the Struggle with Reality in private International Law*[4] a survey was "committed" as to what these theories and conceptions are able to offer and what they are unable to do once reduced to the level of realities. One of the negativ conclusion, *e.g.* was that these theories are open to so many constructions that they provide no assistance in the solution of concrete legal questions (especially as long as they are not settled by statute law), unless some sort of *super* or *meta* law is assumed which would in each case refer us to a specific foreign system, and, we may add, even then (if we are referred to a specific foreign system) there is no guarantee that this "nationalisation" of an international case is the best solution. With other words, any concept which fails to provide concrete rules for law-making or concrete decisions is a mere intellectual play in that mentioned "Heaven of Concepts".

And now *Langen*'s book comes in with even a heavier criticism: "The years from 1820 to 1913 witnessed a thirtyfold growth in the volume of foreign trade", and the expansion increased ever since in even more powerful proportions, "yet the legal scholars have paid little head to this phenomenon", "to their minds" we can do with "rules of private international law which were propounded in the first half of the last century by the works of *Joseph Story* (1834) and *Friedrich Karl von Savigny* (1849) and stand in direct line of descent from the views of North Italian, French and Netherlands jurists whose premises and preoccupation were those of the fifteenth century – an age when America had yet to be discovered and no world trade as such existed... All this is a museum" (p. 1.). To be sure, a well "dramatized" situation, which, if true, calls for urgent and major action. Now this has been met, a tacit assumption of the author of the book *Transnational Commercial Law*, a "work based on a new conception if international commercial law" (p. IX.). How this conception qualifies of compared with other new conceptions, will be discussed in the III. and IV. part *infra;* first let us see what this new conception really is; "refraining from theoretizing" on generalities, as the author's repeteatedly reinforced philosophy goes (pp. IX–X.), following him in his promised reliance on realities, cases and other facts to be honored. It is worth while.

II. The thesis: the New Conception Summerized

3. The categories "thesis", "antithesis", and "synthesis" are of course borrowed from dialectics and in this legal application from a book's organization just of this subject-matter,[5] not so much in order to follow closely the laws of logics and philosophy of these categories, but rather to give a more decided apperance of the views expressed. Langen too, really, uses this method in developping his theory: first analysing why the so far developed theories and approaches failed to cope with the new conditions of international commerce, and then entering into a detailed presentation of the new conception.

4. One and the most general "reaction" or approach of law to any international case is what is called *the classical doctrine*, and what Langen – following his promised method to see what legal practice says rather than legal wrinting – demonstrates by the *Serbian Loans judgement* of the Permanent Court of International Justice: "The classical private international law of all countries proceeds on the assumption that any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country" (p. 2).

Acordingly, the judge must link the contract to one municipal legal system. And this is where the classical doctrine fails, *Langen*'s critical review starts (p. 2 et segu.), because those principles or connecting factors by which classical doctrine links a contract to one *or* another municipal law, become more and more arguable and also because of their ambiguity, hardly correspond to the recent requirements. Against *Savigny's Sitz des Rechtsverhaltnisses* the counter-argument was raised that a legal relation has no seat or that this does not say much to the judge. The "center of gravity of a contractual relationship" carries the same flaws, since the center of gravity may rotate from one part to the other of the whole, because "as in physics situations arise in law where there are two centers or one fluctuating center of gravity... thus this is not a doctrine that will provide an overall solution of the problem" (p. 5).

Little has been done for the international unification of the conflicts rules too, so it is the diverging variety of solutions the national conflict rules offer for the same international case. This gave rise to the problem of the aceptance of the other country's conflict rules by way of *renvoi*, or reciprocity and "neighbourly regard", *comitas gentium* with other words, but with not very practical results. *Comitas gentium* creates namely "a situation comparable to that of two excessively courteous gentlemen who are unable to pass through a doorway beacuse each insits on yielding precedence to the other" (p. 6). The *lex loci contractus*, the law of the place of conclusion applicable to a contract has also given rise to doubt, and it was put aside by renowned courts of international commercial practice, "for in modern conditions of air travel the place of conclusion has become a purely fortuitons detail, open to easy manipulation" (p. 4). The one time unequivocal domination of the principle of domicile in these countries and that of nationality in others gave place to many

exceptions on both sides, so ambiguity again when it comes to concrete decisions. The law of the place of performance *(lex loci solutionis)*, backed specially by German practice, is not given a better grade either, because "each party has to honour his commitment in a different place, so that this criterion offers no solution, moreover, the identity of the place of performance is in itself a preliminary question, which can scarcely be settled without deciding which law is applicable; hence, although there have been numerous judgements in favour of the place of performance and these represent an increasingly practice, this too offers anything but reliable or predictable solution" (p. 4 – 5).

In the summing-up the judgement against the classical doctrine reads as follows: "In this quandry many courts have resorted to a veritable judgement of Solomon and split the contract in two", although "this theory of 'bisection' has been condemned" (p. 5). This is one side of the coin. On the other we are shown all the difficulties and disadvantages (following from the courts' assumed obligation to resolve the particular cases on the line of the mentioned theories and connecting factors leading, at the end, to the application of this or the other municipal law), such the disproportionable length of time needed, the speculative ways to be resorted to, the strengthening of the "homing instinct" anyway inherent, and by all these the forcing of international cases into the Procustes bed of a single municipal system, the "nationalization" of the "international" (p. 203), although – as set forth in the central and leading idea of the book – "nationalism... one time a great force of life, spurring on the evolution of mankind, now it may become a dead weight upon the march of humanity" (p. VII).

5. The *Law Merchant (lex mercatoria)* doctrine is not much better off in the Langen-survey. Rules developped in international practice, *i.e.* non-domestic and non-international legislation products, did not find the simpathy of the supreme courts of, *e.g.*, Germany, France, UK and the US as shown by decisions cited by Langen (pp. 8 – 10.). In the thirties, namely, the supreme courts of these countries are said to have supressed the trial courts' "virtual revolt" against the exclusively municipal law doctrine following the model of the *Serbian Loanos* case. To mention, *e.g.* just one of the inferior courts' dicision in this "revolt", the Hansaetic court of appeal *(Oberlandesgesicht)* in Hamborg held that there was no reason to subject the case to one of the municipal laws in question, "because the case concerns a clause which has become firmly established over the years in international traffic" (p. 8).

But the *Reichsgericht* cracked down on this "interpretation refusing to consider the said internationally established clause except as a component part of the German legal order (p. 9). This is said to be the attitude also of the more recent supreme court practice, and that could not be much changed by the pro-law-merchant scholarly efforts of the post World War II. period either. And *Langen* concludes: "Thus we have seen that the courts are solidly opposed to *lex merccatoria*" (p. 12).

It is not a lex mercatoria question, but *Langen* very shortly delibarates on *international legislation (unification)* too, only to have its shortcomings emerged: the protracted procedure needed, the diverging interpretation coming from the national legal background, the difficulty to bring the treaties into harmony with the underlying national legal systems, their limitedness to certain regions etc. (p. 22). And all this is of course not much overvalued in his preference for case-law, since "the vigorous development of case-law can be expected to produce better effects more rapidly" (p. 22).

6. And then – after having presented the old solutions of the law's reaction to the challenge of modern demands in international trade and after having seen also their failures, i.e. the critical assesment submitted by the book (with some simplification the thesis and the antithesis) – *Langen proceeds to develop the synthesis, the modern way out: transnational commercial law.* In this course we are shown the birth and notion of this phenomenon *(infra 7)*, followed by a detailed analysis of the internal structure of transnational commercial law *(infra 8)*.

7. First he makes us see the birth-process of transnational *commercial law from the first stirrings to its developped notion.* These "first stirrings" as he puts it, are said to be found in the courts' practice. For this he identifies the *Cassia* case as far back as 1908 in which the *Reichsgericht*, although applying German law in the dispute of a German and English shipowner, first recognized the existence and praticularity of the "international case" what really calls for more than the application of simply the one or the other domestic law; in its reasoning the RG namely said that "an equitable balance should be struck... by making sure that the faculties and responsibilities attributed to one side are approximately matched on the other" (p. 14). Should namely in fact the law of either side carry more onus for the one party than the other, the acceptance of such a disproportionate solution can not be considered to have been assumed by the parties, unless there was a stipulation to this end; but if there was none the justifiable assumption can only be this mentioned "equitable balance", i.e. a synthesis of the faculties and responsibilities of the two individual systems of law involved. "The idea of competing legal systems and the necessity of striking a *just balance* between them hangs in the air" says *Langen* (p. 16.) and brings new evidence thereto. In a Swiss-German prescription case in 1922 the RG held that even if by *ordre public* the Swiss imprescriptbility rule was displaced and German rule applied, even then the German court "was under obligation to ascertain which particular provision of the German law came closest to the way of thinking of the foreign law" (p. 16). What is hinted – more than hinted – here to is the common substance of the involved laws, what is to be looked for and this would be the transnational law solution.

The book then lists a series of decisions from various countries (US, France, UK, Czechoslovakia) ranging from 1937 to 1965 in which he sees this transnational law thinking materialized (p. 17). The Franco-

German treaty and the articles of the Sarlor AG are also cited as more recent documents in which traces of the new thinking were visible. These documents provide namely that the applicable law, in addition to the founding documents (the treaty and the Charter of the Company), "shall include the common principles of German and French law, and that in the absence of such principles a decision should be taken in accordance with the spirit of cooperation which presided over the formation of the company" (p. 17). Here we have, asthe argument of *Langen* goes, an although not consciously formulated but factually materialized transnational law philosophy.

Then he turns to the question who in the literature gave first expressed and conscious formulation of this thinking. It was *Gutzwiller* who is found to have written in 1931, when analyzing the activity of the Mixed Arbitral Tribunals set up after the W. W. I., that although these tribunds "had unfortunately not been so free... that they would have been allowed to slight 'international justice' with its ingrained traditions and the claims of its temper and spirit..., it is precisely among the States participating in the Mixed Arbitral Tribunals that, because of a common historical evolution, a series of such special *transnational norms* (my italics – FM) has come into being" (pp. 17–18). After clearing the confusion of this term (as to its origin and its meaning some times not properly used) *Langen* developes the preposition that it was, especially after W. W. II., comparative law that gave decided impetus to the transnational doctrine, namely by its intrinsic trend to find the common core of the various compared national laws or institutions, to concern primarily on substantive law to construe uniform or harmonized *Denkmodelle* and to induce unified or harmonized law, *i.e.* unification as much as possible (pp. 20–23). Given this ideal function of comparative law and legal scholarship, its the more deplorable, as *Langen* says, that not much has been accomplished, little has been done to decrease the fragmentation of private international law (p. 23).

The most ambitious harmonization venture, the Hague Sales Rules had little success so far, and "the practical success of any further harmonization depends on whether the Hague Sales Rules and the Uniform Commercial Code can be brought into line with each other....being the first (the Hague Convention of 1964) a code predominantly based on continental European thinking" (p. 23).

Turning to the American case-law practice, this does not come off much better either. As to the great reformers *Currie, Cavers and Ehrenzweig* the question is raised whether they were on the right path given the circumstance that case-law offers easy positions and invites almost by its nature to transnational law thinking. But *Langen* shares the misgivings of the Europeans, namely that not much new has come out from this source, at least not for the development of a transnational law philosophy.

The forum policy of *Ehrenzweig* is just mentioned with not much credit, especially if we read that "the idiosyncratic terminology of an *Ehrenzweig*, for example, multiplied the problems of the German scholars

in coming to grips with developments in America" (p. 29). (In parenthesis: What *Ehrenzweig*, at least in my judgement, really has done in this line, is somewhat more, to which we shall come back later.) *Cavers's* "result-selective approach" gets the most credit on the account that – what the other Americans allegedly did not do or not enough intensively – he "has taken steps to profit from advances in the field of comparative law", or even more, he expressedly formulated or committed himself to the transnational law doctrine when he said: in his *Contemporary Conflicts Law:*

"The court's principal objective is to reach a result that is compatible with the reasonable expectations of the parties, actual or fairly imputed; the purposes and policies of the States' laws are, *ex hypothesi*, subordinate to this end" (p. 30). But at the end, as far as the Americans are concerned, *Langen* "wentures to suggest that they would do well to adopt the auxiliary technique of comparative law... so as to remove the burden of uncertainty still weighing upon recent endeavours, and thereby promote the universally desired unification of international law, more particularly in the field of commerce" (p. 30). By their inter-state law laboratory the Americans could especially contribute much to the desirable harmonization of judicial decisions on international scope which, in theory, could easier emenate from a case-oriented and hopefully more comparative law influenced American practice than from statute-law countries. And for *Langen* "the harmonization of judicial decisions in cases of international scope brings us to the third stage of the advance towards transnational Commercial law" (p. 30).

Comparative law, as can be seen, is a focal point in the development of transnationed law solutions. On this understanding, and this is a very valuable thesis in *Langen*'s theory, comparative law is much more than a purely analytical or formal comparison of laws. He joins those who "handle national laws as the raw material from which, by a technique analogous to fusion, refining or destillation, the shared quintessence of both municipal systems are extracted, and is recognized and applied as something common. Comparatived law has nowadays to be functional" (p. 31).

So this is the way we get to the thesis of transnational law (remarking, by the way, that "at the moment we must regard transnational law as little more than an inscription on a signpost", or that "transnational law denotes much rather a working method than a new legal order... it can be said here and now", pp. 30, 32). Transnational law, by summarizing *Langen*'s findings with his words, is really the *common substratum* of the substantive law solutions of the domestic laws involved. "*By transnational commercial law we mean*, as he *concludes, the aggregation of all those rules which held good in the same or very similar way for a given concrete legal situation in two or more spheres of national jurisdiction*" (p. 33). This transnational law can apply by virtue of the parties stipulation "or if it appears *prima facie* that transnational commercial law can apply". In these cases there are roughly three ways for the judical assasment. First:

the two domestic laws are for that concrete legal situation substantially compatible, the judge applies his domestic law but referring to its compatibility in order that its judgement may carry due conviction. Second: In absence of compatibility "the judge must endeavour to pinpoint the difference ad to strike a balance... within the limits of non-mandatory rules of both laws concerned", such a decision too remains within the domain of the non-mandatory domestic rules. Thirdly: In the rare cases when these two solutions are precluded by *ordre public* or mandatory rules of the legal systems concerned, the "judge is compelled to make a choice of national law and to proceed accordingly" (p. 23).

8. *Langen*, after having developped the notion of transnational commercial law (really no theoretical delimitation is made in the book, unless we take the circumstance that his cases and legal institutions are taken mostly from the commercial practice although by their legal forms many of the rules are private law rules too), he gives *a detailed analysis on the structure of the transnational law rulings.* This has been done after three chapters on specific subject-matters – licence agreements, sale of goods, limitation of claims – were also meant to demonstrate the transnational commercial law thesis of the book. In the last chapter the *Practice of Transnational Adjudication ("Binominal Adjucation")* a differentation or substantiation of the thesis of transnational commercial law follows. Here the internal structure of the notion is analysed, its application process developped and demonstrated.

a) Well, the aim of transnational commercial law is the *binominal decision*, a term the author henceforth uses for the desired decision competible with the national laws of both parties, referring also to the original or literal meaning of "binominal", what is the derivation of the Greek "two-law" *(bi-nomos)* (p. 203).

But the binominal decision must find its way through the different *language* of the sunstantive laws concerned. The meaning of the term is often different in even the same language of more countries *(e.g.* Germany GDR, Austria, Switzerland). The author brings good examples. The difficulties *e.g.* of the translataion of the GATT texts, or the German *Bundesgerichthof's* decision from 1959 which warned a tribunal that apperent linguistic similarity was an insufficient ground for construing an Austrian statute by the light of German rules (p. 205). Accordingly, the court first has to clarify that in accordance or in spite of the actual words used which is really the same rule or the same legal institution holding the umbrella for the concrete international situation or case in question.

Very closely linked to the language probleme is the *question of interpretation.* The substantially identical rule, the said umbrella can be and often is interpreted in diverging directions. This is a well-known fact. And the divering directions are generally defined by the value systems (national legal systems, policies, international systems) in the background. According to *Langen* for the binominal decisions transnatio-

nal interpretation principles are to be preferred. And the transnational interpretation principles, says *Langen* with the help of arbitral awards in this question and authors like *Grotius*, are "those methods ... which are the same in all legal systems of the world" (p. 209). In a particular contract it is the complex of these generally accepted interpretation principles which should be given preference over other, eventually contradicting national principles. As for example the Hague Sale Rules declare their own principles to be the guideline for purposes of interpretation and do not invite the forum's interpretation rules.

b) The question next reaches already the central core of the transnational law: how to find out the *substantial identity or similarity* of the law or rules concerned. The answer: *by comparison or through comparative law*. This comparison has to be a thorough one and not just an adjunct to a conflicts law adjudication. By a thorough comparison and well closing conclusion the binominal decision is going to carry particular conviction. The book, in this connection, cites 30 decisions "founded on comparative law, ranging over the jurisprudence of all the major trading countries and international arbitral tribunals" (pp. 214 – 215).

But what if there is only a resemblance between the competing laws concerned. Or as *Rabel* put it in 1927 in his periodical: "At one point or another we come to an abyss which is spanned by no bridge" (p. 215.) The answer is twofold. First: The abyss has since that been bridged at many points, though certainly not everywhere (p. 216). Second: "One of the two competing rules may be held up as a *model* to the other and will therefore deserve preference" (a sort of "better rule" as termed in the American practice) (p. 216).

But by what criteria is one rule "better" or more "modellike" than the other? The author's answer: For this the court has to appeal to the judgement of a number of experienced and knoweledgeable persons, to the established legal orders carrying such a rule with the assumption that an established legal order "expresses the experience of many", and to great conventions. A rule may also be examplary because it is "more well-tried", more modern, not so obsolate. This may sound very arbitrary or subjective, *Langen* admits, but in the last resort it is the judge's function to work out the best solution, as it has been in the ancient Rome when the judges' oath said *debet enim iudicare secundum melius ei visum fuerit*, and we may read the same very often today too when, *e.g.* "the solution which may lay claim to respect by *virtue of its quality* (my italics – F. M.), and not only by virtue of its institutional authority" (p. 219).

c) The *striking of a balance between irreducible differences* in national rules of law is evidently, by the logics of the things, the way out if the differences are really irreducible. And to this end *Langen* offers the principle *ex aequo et bono* (not "equity"!, what namely stays within the borders of existing law, whereas a decision *ex aequo et bono* is not based on a settled positive law rule but rather on the justice-idea of the judge). This means that, in absence of a mandatory rule, the judge does not apply one or the

other incompatible rule, but endeavors to reach a solution while having recourse to his justice-idea, i.e. deciding *ex aequo et bono*. Since there was no applicable law stipulated by the parties they wanted to carry the risks of the different laws commonly. Consequently the court "must ascertain the appropriate mid-term between two rules of law" (p. 223). *Langen* refers also to the *Nicomachean Ethics* of *Aristotle* (V. 7) to strengthen the conception of the judge as a *mediator* as part of our cultural heritage: "And the judge is sought as the man who stands in the middle, says Aristotle, and in many places he is called 'mediator' in order to indicate the expectation that one will be justly dealt with if one receives the mean" (p. 224). And in international commercial cases this is, adds *Langen*, *par excellence* the case.

d) Ex aequo et bono is but one principle to strike a balance between irreducible differences. *Langen* proceeds *to present more*. What we can see here is a comparative law survey on the *transnationality* of such principles like the "principles of civilized nations" (with not much explanation who is civilized and who not), "pacta sunt servanda", "good faith" etc. (pp. 225 – 228). Although it is stressed by the author, that these principles are to be derived inductively also "from the circumstances of the case and not just deductively placing summary reliance on an allegedly over-riding general principle" (p. 229), one still can not avert the feeling that in the dilemma concerning the borderline between law and arbitrary judgement these general principles may and often do play into the hand of arbitrary tendencies.

Somewhat or much more concrete and reliable are those principles or rules for which *Langen* brought quite a number of cases to demonstrate that *puncto* the analysed particular countries these principles are equally shared. In the more limited field of commerce, they include the rule that fraud merits no protection, the principle that no-one may cause loss of or damage to another, whether intentionally or by negligence, without incurring an obligation to indemnify the damaged party, the prohibition of racial discrimination, the novation itself does not release the debtor from the original liability etc (p. 230 et sequ.).

e) The last internal structural problem of the transnational law doctrine is the *procedural dilemma*, namely that the judges or courts *(iura novit curia)* are expected to be thoroughly familiar with a big number of national legal systems. The confort offered by *Langen:* There are the parties who are expected to "help" including also the exposition of foreign law, the courts have to focus on "individual" rules for determining transnational law not on the foreign law in its entirety and this makes the judge's position easier. This is really all before the last sentence of the book, where his answer to his critics concludes (a citation from *J. Esser):* "That is the tribute of legal uncertainty which every jurisprudential innovation has to pay in its early days" (p. 245).

III. Antithesis: Transnational Commercial Law – How Far Is it New, Why it Is Not a Law and other Counter-arguments

9. The new conception of transnational commercial law is presented by the author in a very intensive interaction with the various concepts and notions exsisting today in the field of private international law. This direct relation to everything timely and modern is an interaction also in the sense taht the readers, also as sharing or rejecting these various concepts and notions prevailing in this discipline, feel adressed personally. More: one feels compelled to follow the author's analyses and ideas, but also to contradict here and there, to confront his ideas with those of the author, to marge certain propositions to new ones. This thinking process is surely one of the most evident results of a good book. With some simplifications: the more objectives and comments the better the book and vice versa. *Here follow some objections and comments from one of the readers, starting from more general and also minor observations and then going to the* heart of the matter".

10. *First some general and minor observations* or objections the book's theses could have been better protected against.

a) Let me start with a special and at the same time general comment – originating from the circumstance that this writing comes *from the socialist legal orbit.*

It is, I feel justified to say, hardly imaginable that a book of this subject-matter if published by an author of this legal orbit would have been so void and „clean" of almost everything of the other side, *i. e.* the legal developments of the non-socialist world, as this book is void of the socialist side of international trade, "transnationality", transnational commercial law, or whatever we call this whole context. One could say that a book should not be viewed from things not dealt with by the author, but rather from things the author has written on. This is generally true. In this subject, however, the other side of the world is badly missed. Not only because especially in international trade the West is in daily contact with the East, and all or most of the legal problems the author discussed emerge – *mutatis mutandis* – in these relations too. Not only because the East-West scholarly dialogue has a substatial function in both practical and psychologic sense to build bridges, or, to use the favoured formulation of the *Langen*'s theory, to "strike a balance" between East and West wherever it is possible, and here there were possibilities! But also because *Langen*'s theory – and let me emphasise this circumstance: the very central element of his theory – faces, and should have faced the problem how to create or derive *binominal* rules for international cases with socialist and now-socialist parties when, as generally held, the laws and legal philosophy are the reflection and protective means of the underlying economic and social structures, and these structures are in such a case „fairly" antagonistic, to say the least. So what ? No answer – at least from *Langen's* book. (An answer is being ventured in the *Synthesis* of this article in part IV. *infra*).

The only reference to socialist law *Langen* may claim says, at least to me, that he really bypassed the challange: to see how the socialist legal orbit really figures in the transnational law conception. This is reflected in his approach to the Hague Rules. The Hague Rules is a product of international law-making claiming universality and elaborated in long „balance-striking" or harmonizing efforts both by capitalist and socialist countries. Its destiny as a workable set of laws is surely conditioned by the strengtheing of this central element of its *raison d'etre*. To reduce then this problem to the relation of the American Uniform Commercial Code and the Hague Rules only ("the practical success of any further harmonization depends on whether the Hague Sales Rules and the UCC can be brought into line with each other" pp. 23, 73) is at least a onesided approach, if not on unjustified simplification. Especially if we add the other argument (put forward by *Mentschikoff* and shared by *Langen*), namely that the chance to this ULIS-UCC harmony and consequently a viable future to the Hague Rules will be given only if the non-American countries develop to "economies of overproduction rather than one of husbanded resources", and that "the essential premise of its remedies is a free society" (p. 73).

This orientation, I am afraid, is leading nowhere. Sure – facts the arguments of *Langen* and others are based on show this – a worldwide harmonization is a difficult process, but not without hope and not without procedence. We may even say the world's legal machinery could hardly do without the existing international treaties in the field of international private law. With other words – with more or less limits – they are viable. The ULIS as signed and entered into force is a substantial result in itself. With other pieces of international legislation they speak for the real chance, more, for the fact that in various particular fields common legal structures are possible and workable; this is especially the case when the major parties are ready to search for the most practical denominator for not unrealitic solutions. For it is surely unrealistic to tie any ULIS to the standards of an idelaized "economy of overproduction" which exsists nowhere but one country as we are shown in the outlined analyses. This is why such an orientation leads to nowhere, I mean.

International legislation is always a suit tailored for many and not for one user only, and consequently: with concessions and compromis to uneven economic standards (of production or "overproduction") on the one hand and to different legal standards of the participating States on the other hand. This has been possible concerning many international conventions (with the participition of States with different social and economic structures) and did not yet fail concerning the Hague Rules either. *E. g.* socialist countries too participated in the codification, many signed the ULIS, the ratification is not *a limine excluded* by either socialist or non-socialist major countries, the UNCITRAL "ULIS-promoting" actions contribute a futher impetus to the process with at least a more harmonized legal thinking model if nothing else in international commercial law. *Langen* too admits that if for nothing else "the program already achived

is sufficient for the further elaboration of transnational principles to be left without qualm to the jurist and, more especially, the courts" (p. 74). But in this achievement the said international law-making attitude materialized with the varying influence of such laws as, *e.g.* the UCC, the Commercial Code of the Scandinavian Countries, the General Condition of Delivery of Goods of the CMEA (which in turn as shown in their reforms of 1968 and 1975 have been influenced by the ULIS) – and not only a onesided endeavour for a close ULIS-UCC harmony.

It is therefore, to conclude accordingly, not necessarily "confusion" only if unification is developed with regard also to East-West, and it is hardly true that "the wholly different economic system of the socialist States must necessarily result "in basically different approach to the law of sale" (p. 73).

If this was the case the socialist countries would not have adhered to so many conventions in the field of international economic or commercial relations, and the Hague Rules were not a legal product of East-West legal cooperation with values by *Langen* too admitted. If a "different approach" is needed than it is an approach to construe notions and theories reflecting and extending to the whole reality, to build bridges over abysses often more expanded by simplifying political language and psychologic inertia than justified by real differences.

b) And turning to the other side, I think it is *not quite just to say that the Americans are lagging so much behind the* others, supposedly behind the Europeans, in "adopting the auxiliary technique of the comparative law" as they seem to be graded in the book (p. 30, see *supra* 7). As could have seen *(supra* 7) especially *Ehrenzweig* is falling short in this judgement. But to take just *Ehrenzweig* he is surely seriously and highly credited by both American and international scholarship for its efforts to adopt the auxiliary technique of comparative law. Let me mention only his two big volumes of *Private International Law* undertitled and also in their substance *comparative studies*[6] let alone his other works and activities in this field.[7] Everybody knows what *Rheinstein* and *Yntema* has done in the field of comparative law. From the American "spring" of comparative law sprang up the *American Journal of Comparative Law*, and Michigan was the birth place of *Rabel's The Conflict of Law*. *Cavers* is properly credited by *Langen* too *(supra* 7). Or let me take another very concrete and very effective comparative law project – by the way somehow just in the line of "transnational lawmaking": *Schlesinger's* Cornell project on the *Formation* of contracts.[8] This highly valuable work in both pragmatic and theoretical sense accomplished a worldwide (socialist States included) analyses on the rules of the formation of contracts synthesizing the *common core* of the various national systems. No doubt this is an impressive comparative law product, not only pure theoretizing. Its common core theses as direct indications may serve international legislation, the development of internal law-making, the law-making function of the judge when and where he is left alone in this position in a particular case, and they also serve as theoratical propositions, in the endre-

sult for an optimum in the search of harmonized legal models in particular fields of law.

These are facts, others could be added from the court practice too.[9] And facts are hard things. *Langen* were surely the last to say with the German philosopher (when he saw that facts contradicted his philosophic statements) that *um so schlimmer fur die Tatsachen* (the worse for the facts).

c) Comparative law or comparison is as we could see, one of the main elements, the main process to get to the optimum transnational or binominal rule. *The idea that via comparative law we may develop better legal solutions* than without the vistas provided thereby, *that comparative law, comparative approach in general, may substatially contribute to create harmonizing solutions* (to transnational *rules if we use this language) is an age-old part of human thinking.* This could be, I think, the conclusion if ventured of a comprehensive historycal survey on the genesis of comparative law, of an *Entstehung und Werdegang der Rechtsvergleichung* as it could be titled with expressive *Aussagekraft* in German. In the light of this the statement that "the developments of the 45 years since 1925 are the approximate birthdate of comparative law" (p. 23) sounds at least doubtful. That the last decades, especially those after the W. W. II brought an unprecendented tide in comparative law efforts is unquestionable. The tide is unprecedented, but not the water.

May I refer to just some incidents of the supposed comparative law genesis. *Langen* as could be seen (*supra* 8c) cited *Aristotle* to strengthen his position concerning the judge as *mediator*. Let me cite from the same work of *Aristotle*. In the *Nicomachean Ethics* he phrased the function of comparative law just as precisely and consciously as modern comparative law thinking to which it is so often, and seemingly mistakenty, connected. It is well-known, that he has analysed and compared more than hundred constitutions in order to make, as he says, the possibly best law.[10] But let us make a shorter leap into history, to the last century only. In the middle of the last century – int the tide of social, economic and legal reforms, more revolution – eminent Hungarian lawyer-politicians *(e. g. L. Szalay, J. Eötvös)* made very thorough comparative analyses as part of their efforts to develop modern laws, to create comparative law vistas for a good private law codification.[11] Other nations may display even more expressive or better known developments. May I refer to the well known French *Société de la Legislation Comparée* only, founded at the end of the last century (1869), and running its *Revue Internationale de Droit Comparée* with so much success ever since. The central idea (shown also on the cover of the *Revue: lex multiplex – ius unum)* of this *Société* was the legislation of laws in a most possible harmony with such laws of other countries, a comparative legislation.

11. The next comments *question the thesis and antithesis of Langen's new conception*, namely that the classical doctrines, the unification, *lex mercatoria*, and the other ways, *i.e.* everything before transnational law was so ineffective or *so* failing that without the needed coming of transna-

tional law the whole structure was close to collapse, a verdict not expresselly formulated, but somehow tacitly suggested by the sequence of toughts and arguments of *Langen*'s book. What we are given to read (outlined *supra* 3–5) is first the classical doctrine with its shortcomings and failures demonstrated and with the suggestion that, accordingly, another solution was needed. *Lex mercatoria* seems to have been this solution, at least this follows from the circumstance that *lex mercatoria* is being treated by the book not only subsequent to the classical doctrine's failure but also because this connotation is attached to it. But *lex mercatoria* was not able to bring the salvation either. Accordingly, something else and new was needed again. And then comes unification, also with a very weak credit in *Langen*'s sequence of thoughts. Of course, again something else and new was needed – and this was comparative law (or comparative law effects in private international law) with its birthdate expressedly postponed to the recent decades. But, in the book's survey not much did come out of the comparative law approach as the most recent experiment either. So there was no way out: let transnational law come and save the situation.

I think that this train of thoughts and arguments may be justified logically, it makes the need of the transnational concept more apparent. But it is not justified at all, more it is misleading when coached as the historical side and facts of development, and this with two false tacit conclusions. *The one* being the impression as if the doctrines and ways in question would have followed each other in time. True, many examples and cases used in its arguments, by themselves, speak for a coincidence. But the author did not emphasise the fact that these ways and means were complementing each other and were and still are carrying jointly the whole legal structure of the international economic and personal relations. A junction rather than a disjunction is the appropriate reflection of the actual development. The appearence of the unification of substantive law – its growing importance – is not displacing the other ways suddenly and generally, they live in close symbiosis, even if substantive law unification is also a sign of the limited powersources conflicts law may provide. *The other* being the impression or the implied conclusion the reader is led to draw that the next doctrine or way is always displacing and replacing the former and so does the last one, *i.e.*, transnational law too; transnational law becomes thereby the dominant way and general cure for everything or for almost everything.

12. *The non-transnational conceptions in their ensemble* and also in their particularity ere not as impotent, this is admitted by the author too. To use his example (p. 6.) those two excessively courteous gentlemen ("introduced" *supra*. 4) still passed somehow through the doorway, and many gentlemen were and are doing so ever since. Many – many international cases passed through the doorways of conflicts law and still do so. The author himself says, *e.g.*, with regard to the connecting principle *lex loci solutionis*, that "there have been numerous judgements in favour of the place of performance and these present an increasingly important

practice" (p. 5). He also admits, that the *lex mercatoria* doctrine may claim a number of decisions in favour of its efficiency (p. 10) both in the practice of trial courts and the field of arbitral awards (p. 12). I am not sure, to proceded with the comments in favour of the "old" doctrines' ensemble, that *e. g.*, the principle of the place of conclusion was so generally and totally put aside as one might think by reading the *Kegel*'s report that this connecting principle was put aside by the Swiss Federal Tribunal in 1952 and the New York Court of Appeals in 1954 (p. 4). Although the book, as promised, is relying on cases rather than on doctrine, but when the transnational law concept is developped (p. 13 et sequ.) we don't see so convincigly more cases analysed in the pro-direction than such ones who speak for the viability of other doctrines like the *Goldfields* and *Sapphire* cases for example (p. 12). The forum law theory, or rather "the local law of the court . . . applied in all simplicity without much ado" counts for quite a frequency, as *Langen* recognizes, in the more recent times (p. 17). When, finally, to the already mentioned importance of substantive law unification *(supra*, 10/a) we add the fact that the national codification of conflicts law is showing an upward trend[12] then the "old" machinery seems to keep potent function in the legal channeling of international trade and other private law relations.

13. And now *coming close to the heart of the matter, to the core of the conception* of transnational commercial law one of the comment one may rise is, that *there is no definition* or delimitation or description of what "commercial law" really is in this transnational law. Is it a branch of law *(a Rechtszweig)* as continental jurists would call a system of rules belonging under specific criteria to one branch characterized by these criteria ? Or is it more a loose set of laws and rules operating in the field of international trade ? What belongs then to this category ? Conventions and treaties of substantive law nature ? If yes to which extent ? What about the international rules or the laws emanating from the economic integrations as concerning the corporations or antitrust law for example ? Or is it the conflicts-ridden sphere of international trade only ? Although one must admit that even continental lawyers are not totally "complete" in the systematizing of the various branches and systems of law, and this applies to international commercial law too, still there are some orientation strongholds and when a new conception of international commercial law is launched, more clearness should be able to be expected.

When we look at the implied delimitation-conclusions of *Langen*, than his transnational *commercial* law is really the sphere of conflicts law, *i.e.* conflict situations of two or more national laws which are suitable to the coming into operation of a transnational solution, a binominal ruling, situations where the "striking of a balance" is *per definitionem* possible at all. This follows clearly from the transnational conception if we remain within the limits of its conception-constructing lines as described above (*supra*, II). The circumstance that *Langen* relies at many places on conventions or municipal substantive laws (ULIS, US Uniform Commercial Code, BGG etc) does not make much difference when the borders

of principle of his conception are considered. Norms already settled either by international or national legislation may serve at most as reference sources and partial components of the binominal rules the judges are developing and applying in order to resolve concrete conflicts-situations instead of having recourse to classical doctrine solutions to this end. And the *commercial* in this – thusly limited – transnational commercial law is really that part of institutions of traditional private international law in wich predominantly merchants are channelling their transactions, although the same institutions can be and are used by nonmerchants too (*e g.* sale contract as the most evident of such instituions). With other words the *commercial* is the *prime facie* or traditionally commercial character of a given deal or concrete conflict situation to the solution of which this or the other conception may be offered and to which the transnational conception offers of course its transnational rule it would search for in the described way (*supra*, II.).

14. The next comment concerning the hard core of *Langen*'s transnational law touches upon the legal character of transnational commercial law: *is it a law or a method only?* The book is not sufficiently unequivocal in this point. On three places we find allusions that it is a method or methodology only. So for example in the *Foreword* we read: "The aim of this book is to stimulate the use of a new method" (p. IX). Then he rises the question (without analysing it unfortunately) whether this "methodology" could apply to East-West relations (p. 1). An in another four lines really hidden in an analysis of another problem, we are plainly said, that "it must be made clear from the start that transnational commercial law denotes much rather a working-method than a new legal order" (p. 32). But these statements disappear somehow in the whole work (they count 4–6 lines altogether on the mentioned three different places), although this is a vital side of the whole conception if we want to know what it really is, therefore this methodology character should have been more explicity elaborated. In fact it is not. Probably not by chance.

On the whole, namely, the image is projected as if transnational cimmercial law were a law. In the lastly cited statement itself, otherwise meant to be most foundamental, this transpires trough the words "much rather. . . .than", a formulation admitting the other ("legal order") side already by this very grammatical or logical structure, this being more a junction than a disjunction. But the projected law-image emanetes also from the circumstance that transnational law is uxtaposed to the classical private international law, more it is said to be a better legal solution than the classical doctrine and offers more efficient future than protracted international legislation, with other words: transnational commercial law is elevated to the level of real laws, legal orders, aggregation of rules which have their binding force in their constitutional law structure, namely that they have been passed by lawmaking bodies as defined and admitted by the constitutions of the countries involved. The law-image is quite clear when it comes down to the theoretical summarization of the new conception. And here, as already detailed above (*supra*, 7) Langen

concludes, that "to summarize, by transnational commercial law we mean the *aggregation of all those rules*" (p. 33, my italics, FM). This is now a clear and frank proposition. And by "all those rules" really all those rules are understood which in the broad field of the aforesaid *prima facie* commercial law (*supra*, 13) may play a part in the "transnational adjudication". And these are an undifinible aggregation of rules existing in numicipal laws, international treaties, judgemade rules, and the combinations of all these, or nonexisting rules called into existence by the court in the transnational law-making process as described by *Langen* (*supra*, 8). In the transnational adjudication process this whole aggregation of rules of varying origin is not only elevated to the level of the positive laws, but by this elevation the various rules (if not newly developed in the concrete situation) are also alienated, cut off from their concrete source of law, they become freely handled pieces in the transnational adjudication activity of the judge, and accordingly, their binding force (their *norma potentiae*) emanates from their metajuristic convincing power, or lastly from the circumstance that a variation of their possible combinations is formulated and applied by the judge as *ratio decidendi* in a given concrete case.

But these are not characteristics of law as the body of binding rules. As it is generally accepted any rule claiming to be a legal rule has to be formally and identifyably phrazed as such and has to be "filled" with State power or authority of a concrete State or an ensemble of States, *i. e.* it has to be made by public organs authorized thereto and published as source of law adressing thereby accessible orders to the possible parties and the law-enforcing organs, the courts. To the extent courts are authorized to make law (besides enforcing the legal orders of the legislator), the same applies to their *inter omnes* rules *mutatis mutandis* of course. Customary rules or judge-made rules of foreign or international origin can be considered as law only because these rules are christalized and more or less firmly established rules suitable also in their identifyable form to be followed, *and* accepted and sanctioned as legal rules by municipal trial courts of a given State or by international fora the awards of which are enforced by the relevant States. And there is no other law. *Lex mercatoria* if considered as a set of rules beyond international and national legislation is, at the end, also a customary law effective only there and to the extent where it is backed by the State aithority, the authority and the faculty to operate by force if necessary of such rules must go back, no matter how thin the thread is, to a so-called Kelsenian *Grundnorm*, otherwise it is not a law. The same applies, again *mutatis mutandis*, to any solution, indication or "rule" offered by a comparative analysis, or by comparative law generally; such rules can be applied as legal rules only either because they are legislated or judgemade rules of a concrete State and therefore correspondingly applied by this State or they are the product of international and foreign legislation, international and foreign customary law but accepted and their application ordered by the State. There is no comparative law rule or legal order in the legal sense of the word. Comparative "law", rather comparison can only syntesize the various

involved regulations and offer its syntheses as indications to the law-maker (legislator or judge).

In the same sense transnational law is not a system of legal rules, and therefore not an "aggregation of all those rules", not a law in the legal meaning of the terms. If all the transnational or binominal rules *Langen* has synthetized and the others which could be synthetized in the broad framework of transnational commercial law were a real law and an aggregation of laws then they would live and float somewhere above the "normal" or "terrestrial" rules and legal systems, described and defined from time to time by someone (by whom and by what kind of authorisation ?) and the States or courts were only expected to stretch up their hands and pick out the rule most suitable to their case. This picture is not much changed if we say that it is the State or courts who are supposed to define the whole aggregation or only a particularly needed rule of transnational law. In this case too the *corpus* of national rules would depend on the actual "mind" of the actual State or court who says this or that rules to be the transnational law. Transnational law, thusly, is a varying corpus of rules depending on the "being" (legal scholar, judge, legal counsel) who is just vizualizing or synthetizing this meta-world of norms. These norms are said to carry their *norma potentiae* in their convincing character, in their being better tried, in their "virtue of quality" in their model-faculty, in their wide acceptance by "experienced and knowledgeable persons", in the arbitrariness-ridden *ex aequo et bono* justisness-feelings of a supposed ideal legal mind (pp. 216, 219, 222) etc. – again meta-juristic factors. But how fragile and how arbitrary comsequences these thusly "justified" – to private law "justified" – transnational rules may have, let me, *e.g.*, mention that "the prohibition of expropriation without compensation" is also listed, although with not explicit reservation in a footnote, among such rules or general principles (p. 130).[13]

It would be another story, of course, if the court would pick out a rule from the aggregation of such transnational norms because it is ordered to do so being that rule part of an international or foreign regulation due to apply by virtue of the courts' conflicts law order or because the state is adhereing the international regulation (a convention, *e.g.*, in question). But *Langen*'s conception goes, as could have been seen, farther. It extends also to rules which are otherwise a good and rational *mixtum compositum* of all possible regulations involved but without "legalized" ties to the forum's constitutional source-of-law rules (see the binominal rules proposed to strike a balance between irreducible differences in national laws, *supra*, 8c).

Again it would be another story if we were to say that this picking out of a rule from the transnational "tenders" operates within the court's competency to settle the case. With other words if the judge were left alone by legislative or binding customary rules – then it is his legitimate privilege and duty to make that norm (and to take it from a transnational law analysis if he thinks so) on which his judgement can be reasonably built, which may serve as a reasonable *ratio decidendi*. But as could be

witnessed, *Langen's* conception goes for beyond this. If the so developed *ratio decidendi* is continuously adopted and applied by other courts too, then it becomes, with regard to that particular state, a binding precedent or customary rule, and again not, in the described legal meaning a transnational rule.

15.1. This lastly mentioned situation when the court is free and forced to create an individual *ratio decidendi* because there is no preexisting "settled rule"[14] – as the forumapproach reasoning of *Ehrenzweig* goes – which would be binding and give *in thesi* prefabricated solution into the hands of the judge, this is the situation where as a residuary rule the *Ehrenzweigian* forum policy comes in. Because for the judge, whatever the preferred and applied solution-rule can be qualified to either in the adjudication procedure or *ex post facto* to a foreign rule through this or the other conflicts law *lex*, or to something else, perhaps to the *lex fori* or to a new rule, for the judge it is the forum policy: the valuejudgements and philosophy prevailing in the forum-country and shared by the judge which formulated and define the substantive law solution. Because the judge does not and can not act in a value- and-policyless vacuum, as a rule he can not dissociate himself from the values and policy his court is ordered the maintain, he also can not perform the *Mülhausen* spectacle to lift himself up and out of his situation, he is part of the forum policy structure and in the particular situation described he applies forum policy.[15]

From the *lex-fori* conception – really an approach rather than a theory[16] – *Ehrenzweig* made a substantial step farther: he developped the theory of *private transnational law* in his Hague Lectures published in 1968.[17] This excursion or terminus to Ehrenzweig was undertaken for the last critical comment concerning the new conception of *Langen's* book: *how far namely is this conception new?* Before answering this question let us briefly summarize *Ehrenzweig's* private transnational law.[18]

a) The field of operation of this private transnational kaw is really the same as the transnational commercial law of *Langen:* the institutions of conflicts law or their background substantive law institutions which are, depending on the nature of the actually chanelled deal, used both by merchants and non-merchants; with one addition however, *i.e.* that *Ehrenzweig* deals with *per definitionem* non-commercial law institutions too, for example with family law questions. But in this connection this is not decisive, because by classical private international law such problems as family law, persons, property, labour law, companies, obligations, procedure etc., well a broad spectrum of parts or branches of both private and commercial law have been covered for ages. The same scope is meant by *Ehrenzweig* for private transnational law.

b) Transnational law according to *Ehrenzweig* is made up by those mostly substantive law norms (growing in number), rather specific than general principles, which are *in their substance common in the various domestic legal systems.*

c) It comes to the application of such norms or principles because:

1. the sunstantive rule of the forum is not spatially applicable,

2. the application of a foreign rule is not required by either a "super-law" (a treaty, *e.g.*) or a settled rule of choice.

3. in this case the choice must be based on the interpretation of that substantive rule of the forum which either party, or the court in the public interest *ex officio*, seeks to displace,

4. and this interpretation may lead to the application of a foreign rule while the substantive rule of the forum applies as "residuary" only.

d) Why rather specific than general principles ? Because such general principles as, *e.g.*, the personal status, the *lex personae* have so many incidents and these are resolved under their specific relations that the general status afterwards is hardly more than an empty generalization, although useful for jurisprudence. Besides or against the *lex personae* other rules may govern the contract of the spouses, the family torts, the widows position etc. Or within the tort liability institution specific rules may apply to the guest (the so called guest statute) and others may be required to apply to the admonitory sanctions.

e) The theory of private transnational law, as *Ehrenzweig* emphasizes, "can be required us an independent legal descipline [let alone a branch of law – my insertion, F. M.] only in the same manner as legal sociology, legal philosophy, legal psychology, or comparative law. Being, allpervading, these "subjects" are not branches of the law like contract or bankruptcy, but methods in each such branch."[19]

15.2. If we now think to summarize the *newness* of *Langen's* transnational conception than we may conclude to the following statements:

a) Transnational law is surely a new fenomenon of our decades. But *Langen* does not pretend that he has the priority or exclusive merits in developing this new conception, he has not, by his book, filed a patent law novelty suit as to the exclusive right to this conception.

b) He "only" says, and this with right, that his book is *based* on this new conception. To this end he has searched for the first stirrings of transnational thinking in the court practice and legal writing. And than, with many facts at hand, he developped a theoretically postulated notion of this partly witnessed and explored, partly created conception completed by an analysis of the internal structure and developing process of transnational rules.

c) In this effort he missed to consider the private transnational law conception of *Ehrenzweig*, although it is not quite the same as his. Their books have identical values in at least two perspectives. On the one hand they are the first elaborated postulation of this conception since everything before was more sporadic or isolated and not sufficiently and not systematically developped. On the other hand both of these books go into details and elaborate a series of transnational rules or chances for transnational solutions concerning a substantial number of legal institutions.

The *Ehrenzweigian* private transnational law is, however, more limited than that of *Langen*, and in this extent not the same, again in a

least two perspectives (and in this regard the newness of *Langen's* conception is surely original). On the one hand (besides analysing more cases) his conception is completed by a very valuable and detailed processing theory, by comprehensive propositions concerning the developing process of transnational rules. On the other hand the conception of *Langen* goes much farther in the scope of transnational law: for Ehrenzweig its existence is limited to the above mentioned rarrow compass and is meant to function as a method only *(supra*, 15.1.), for *Langen* it has the described more general prevalence (*supra*, II.) and pretends to be more a law (an "aggregation of all those (relevant) rules") than a method only (*supra*, 14.), a circumstance that was questioned above.

IV. A Tentative Synthesis: a) Realistic Theories Combined

16. The transnational law conceptions of both *Ehrenzweig* and *Langen*, even in spite of the critical objections and comments "invited" by themselves, are to a high *degree realitic theories or conceptions* contributing very substantial elements to the whole legal machinery of the international economic and personal relations. This of their values, especially their pragmatic orientation and efficiency referred to becomes even more evident when we look at them from the vista of a more general survey of comparative law thinking. I say from the vista of comparative law thinking because this seems to be justified by at least three considerations. First because these conceptions arose and developped in the main stream of contemporary comparative law thinking. Second because they reach their transnational rules *i. e.* the essence or hard care of their own identity and newness via intensive comparative analysis. Third because they already contributed to the development of a more efficient and more concrete comparative law "theoretizing".

a) *Let us start this valuation within the framework of a more general survey of comparative law* by *Rabel's* universalism which was by far more realistic than the ideas behind the *legislation comparée* (*suppra*, lo/c) so much maltreated by nationalism and two world-wars. Everybody, or almost everybody, who so far has approached the discpline of private international law and comparative law with a creative mind, inevitably goes back to *Rabel*. Ever since he complied his *The Conflict of Laws* in four valumes, he has become the Omega to whom even those return, who have have not made him their starting point. His work has somehow become the landmark of modern comparative law and private international law. History has made it so. Amidst the turmoil of a world war, when the mutual respect and the recognization of the values of nations was anything but reality, *Rabel* began to write his *oeuvre sine ira et studio* and has done many other things for a cooperative comparative law spirit. The realistic and historically very desired elements of his comparative law conception were many. The major ones:

1. The reiteration of the faith and necessity to appreciate the others too. This man of learning, who fled Hitlerite fascism, amidst the disillusonment, ire and exasperation of the war, did not only give expression to "the deplorable state" of his discipline,... "to a change of which mutual understanding and toleration were as wanting as in international policy".[20] He reiterated his his faith for the epoch following upon the war in his comparative *Conflict of Laws* as follows: "What this book is intended to suggest is a patient and concerted world-wide discussion determined to relieve the present chaos.... The legal profession has great power and deserves great confidence".[21]

2. To bild up, wherever possible, harmonized legal thinking models was another major effort of his conception. He pleaded for the integration of the legal and scientific values, of all countries and has become the most prominent designer of the circuit whence institutes and periodicals of comparative law were to spring forth.[22]

3. His conception pleaded also for a quite pragmatic integration, namely the international legislation or unification of subject-matters especially inviting thereto. In his work *Das Recht des Verkaufes* he showed how through international agreements and other legal instruments implemented in practice, a new *lex mercatoria*, independent of domestic and conflicts laws could be established as a fact[23] to which comparative law may contribute so much. Although he also emphasized, especially as far as the gradual harmonization of decisions *(Entscheidungseinklang)* is concerned, that we should not rely on ideas (*e.g.* this harmony of settlement) too remote from reality.[24]

b) It is only to be regretted that within a few years after War the earlier expectations of an Augustan Peace, owing to the cold war, dwindled to more hope. Instead of mutual understanding heavy, not always scientific, criticism or discrimination prevailed in East and West against the other. Comparative law in the socialist legal orbit was disclaimed any need and justification or simply ignored this time.

Still it was comparative law and it were the comparatises of the legal profession who, working into the hand of an approaching better climate of international politics too, still and soon started a dialogue if even with a lesser or more pragmatic faith than anticipated for an after-war Augustan Peace. This comparative law has been marked by confidence subject to proof; the more through comparison the more justified confidence in realistic ends. The names are known, all scholars of this time now (*R. David, A. Ehrenzweig, K. Zweigert, M. Angel, Gy. Eörsi, I. Szabó, T. T. Blagojevic, V. Knapp* to mention just a few from both sides). The "realistic ends" range from the mutual cognition to cooperation and common laws. Analyses of the other legal orbit with ends other than the assumption of or the speculation on the rapid historical disappearence of the other side become more and more predominant. Conceptions got reinforced that the comparatist is more of an architect than a photographer, and this also with regard to East-West comparative law activity. Socialist law became part of the general comparative law sphere also in

the West, and vice-versa. Although many think that comparative law is only a method (how to effectuate a comparative research activity) and not a discipline of its own, the tendency is the growing belief and fact, also on the socialist side, that comparative law is though not on order of a branch of law but a discipline of legal science with the possibility of developing theoretical comparative law statements or theses as element of comparative law conceptions or theories concerning well-difined questions or legal institutions, and this also with regard to East-West again.

The *East-West Comparative Law Conference of Budapest 1969* can be mentioned as one major station in this respect.[25] The working idea of the International *Encyclopedia of Comparative Law* with socialist participation is a major outcome of this tendency with global importance.

Comparative law in this realistic conception may serve (beyond the ends it is capable to serve *within* this or the other legal orbit) the cognition of other legal systems and laws, a better fundation of legal theories or legal philosophy, the dialogue in the spirit of *détente* or peaceful coexistence, the criticism of or struggle against retrograde or otherwise hostile opinions, the unification or international legislation, the elaboration of harmonizing legal thinking models with regard to particular legal institutions, the adjudication activity of the judge – and all the ends fostered by these phenomena (cooporetion, understanding, legal education, practice, legal science etc.).

c) But as can be seen, besides the more general ends substantial emphasis rests in legislation, thinking models, indications to be used by the judge in particular or welldefined questions and legal institutions. Instead of very general theorizing, which both *Ehrenzweig* and *Langen* are opposed to, more concrete theorizing: elaborate rules or principles for the growing practical demands concerning well-defined concrete institutions. This is what the transnational law conception comes in with: concrete rules and principles for concrete fact situations (legal institutions) with a defined processing method to develop such rules and principles (the question of how much their transnational law is a law has been discussed already and in the course of this the range or scope of their conception became evident too (*suppra*, 14 – 15).

Their conceptions are realistic and highly valuable at least for the following reasons.

1. By their transnational law propositions they correspond to very important needs of reality, *i.e.* to the developing of rules needed in the practice of international trade and personal relations.

2. They are meant to act more in the field of concrete institutions where a commity of rules (transnational rules in their language) is viable.

3. *Ehrenzweig* through that "narrow compass" where there is no settled rule in private international law and where therefore, through interpretation of the forum rule otherwise non-applicable, the judge has to resort to the residuary solution to develop a transnational rule *via* comparative law analysis.

4. *Langen* is offering the same for this compass – but goes also beyond this framework: no matter whether the fact situation is covered by a settled rule a transnational or binominal rule is said to be developed and justified in conflicts situations, *i.e.* generally with regard to any international case (this later element being questioned above, 14 – 15).

5. By all these functions transnational law contributed much also to the realisation of those more general but also realitic conceptions and ends of comparative law which are discussed above (16a – b).

17. *If we combine elements of these conceptions, theories or approaches of comparative law* we may proceed among others to two major conclusions.

a) The framework and substance-elements comparative law as a legal discipline can be seen, theoretically justified and developed. In socialist legal writing this "can be..." has been transformed recently, as far as comparative law as a general discipline is concerned, to an "is..." (namely theoretically justified, developed etc.) by the new book of *I. Szabó* "The Socialist Theory of Legal Comparison".[26]

b) In defined subject-matters and with regard to certain legal institutions *comparative law syntheses are justified and needed, and this also with regard to East-West.* Let us limite the validity of this statment, at least for this article, to commercial and private international law as the major home of comparative law syntheses. The development of such syntheses demands of course a through analysis of the regulation of the socialist and non-socialist legal systems involved, the thorough analysis of the underlying social and economic factors of the particular regulation in question, the facts and considerations justifying harmonizing rules with East-West validity – a requirement not met by the analysed transnational law conceptions.[27] Into these comparative law syntheses transnational rules and the adjudication process as developed by *Langen* can be combined. These comparative law syntheses are namely an optimum of theoretically justified solutions for particular fact-situations or legal institutions. They are indications suggested (by anybody undertaking a research-project of this nature) to lawmaking bodies and legal thinking generally. To lawmaking bodies – legislators and judges if the later are meant also to make law in the situation in question – that they may adopt these indications and transform them to real legal rules by providing them with the State authority legal rules are conditioned of. These indications, the transnational rules if we like it, are not elevated *ab ovo* to positive law anticipating and accepting thereby a meta-law of metajuristic structures as figuring in the transnational conception. They remain what they are: indications, models of suggested real rules. They evolve into real rules if so ordered by law-making bodies authorized thereto. And then: these indications, accepted or not by law-making bodies, serve also as devices or cristalized theoretical statements in the international and domestic discussion of legal science contributing to a more harmonized legal thinking when the regulation-element of certain questions or legal institutions are visualized and projected. One of the outcomes of the

comparative law synthesis-making is its influence on the contract-practice induced thereby to a harmonizing regulation of the contractual relations.

18. Accordingly, the second major conclusion when the mentioned conceptions are combined is the *perspective of comparative law syntheses or, as I would prefer to say, of a comparative law synthesis theory as a possible set of justified comparative law syntheses.*

Langen in strengthening his theoretical positions, that *e.g.* "certain conclusions have become essential instruments of progress all along the line", cites *Einstein* and *Heisenberg* who state: "what is possible, what is to be expected, is an important constituent of our reality, and one which may not simply be forgotten alongside given facts" (p. X. – XI).[28] May I too quote *Heisenberg* – partly to strengthen *Langen's* conception also as a theoretical category. Also because he often claims to dissociate himself from "theorizing", one could almost say from theories in generally. With all credit to its expressed decision to go into the forest of practice, because that is what counts, that is reality and law and this is what he would like to be concerned with. But not all theory comes from the devil on the one hand, and he too submerges into deep waters, as could have writnessed, of theoretical discussions on the other hand. And real theories must emanete from reality, from experiments and facts and must also be related to them. By *Heisenberg* the following is held of the birth of a theory: "The development of science is frequently seen as a sequence of events of the following kind: First new phenomena are being observed, they are studied systematically, and after a sufficient amount of experimental material has been collected, the results suggest the concepts, by which the material can be interpreted. Finally, by collecting new data and by refining the concepts a theory can be developed."[29]

I think this is exactly where we are with the comparative law concepts, and also with the transnational law conception. The major virtue of all these are the facts and phenomena being observed, namely that international cases need better solution than often offered by the *procustes* bed of the conflicts-rule-ordered national law, that international legislation is a slow process, *lex mercatoria* is not a general salvation either, and that so practice resorted more and more to the "striking of a balance", *i.e.* to a justifiable optimum rule (a transnational or binominal rule in the transnational law language). The next step is the concept: with the transnationalists the postulation of the general justification of binominal rules, with the comparative law conception as here understood the postulation of the general justification of comparative law syntheses as indications to the law-makers and legal thinking as described. In these connections both the comparative law and transnational law conceptions are theoretical conceptions.

To proced a step forward, I think that "the sequence, of the events" may have gone so far as *to require the development of a comparative law synthesis theory.*

This is being ventured below claiming also East-West relevance, and this from socialist point of view. As will be seen elements of the transnatic-

nal conception, especially its often mentioned processing method, are at several places built into this theory – *ex post facto* I must say, since this theory is now only a somewhat brushed up English version ot its original Hungarian from 1969.[30]

IV. A Tentative Synthesis: b) a Comparative Law Synthesis Theory

19. *First a general thesis* which is surely undisputed – indeed indisputable. Namely: any theory of *legal* science has to be related ultimately, at least as one of his major if not most decisive relevances, to positive law. The *sui generis characterics or criteria of a legal science theory are, that its subject-matter consists of legal phenomena and that is is directed – by unfolding laws a d tendencies in the development of law – to making, improvement, change and unmaking of law.* The same must hold good for a theory of comparative private international law, if there be such a thing, since it is comparative private international law for which a theory is ventured here. Accordingly, when legal writing, an author deals with the "how" of the comparative law activity, i.e. when it explains how an author should write about several legal systems, how a lecturer should lecture about the same: this may be a very important activity of the theory of jurisprudence (in the present case: the methodology of comparative law research and writing) nevertheless it is not a legal theory, strictly speaking. From the aspect of theory of science *(Wissenschaftstheorie)* the term "legal theory" will be deserved by such a theory only for which the ultimate subject and object is law, and not the skill of how a comparative law or any legal study has to be written. This has to hold good also in the light of the requirement, or even more thereby, that law must be seen simultanously in its social context. This is held also by the rationally thinking modern legal philosophy. The excellent work of *V. Peschka* on modern legal philosophy absolves me from a detailed theoretical documentation thereto. *Peschka* starts with *Kelsen* who, in his "General Theory of Law and State" explains that "the subject-matter of the general theory of law is the legal norms";[31] *Peschka* continues with *Hegel* and the *Philosophische Hefte* professing that cognition ("theoretical" cognition) and "volition" (i.e. the "practical activity") – these two form the essence of theory;[32] and lastly he draws the conclusion: "The relation of consciousness to existence *covers both the theoretical, intellectual and the practical, volitional processes*, namely in such a way, that within the dialectical unity the decisive feature is *the practical relations of the consciousness to existence, in which the cognition is just one indispensable, essential moment.*"[33] The highest form of abstract legal conscuoisness is the legal theory which, according to the aforesaid, cannot function in a correct manner unless t unites the moments of cognition and practical action. This can only mean the cognition *and* the shaping of the law – i.e. norms and system of norms – while the latter moment has priority. This is true even when law too is considered as an expression of the social relations, as a means

to shape these relations, and society is ultimately interested in the development of the social relations and social values. Since this cannot be achieved without law, and since law also functions with a relative independence, therefore society recognizes the social value of law and expects that a socially useful theory should have its impact on law through which a socially useful result is expected.

20. Our *next thesis* concretely refers to comparative private international law. The essential point of it is that private international has no independent value systems. It is nothing but the summary or reference rules of law which are shaped by the legislator in each case depending on the substantive-law institutions presumed in their background, according to the value parameters of the latter. This, namely that there is no such a thing as PIL-justness *(Gerechtigkeit)* but only substantive-law-justness – sounds albeit a little vulgarized. It would be more correct to say that a PIL-justness cannot be reasonably supposed except as the projection of the substantive law justness in conflict law. In the language of socialist jurisprudence this means two things:

a) Generally: that private international law should serve the uniform and "settled" regulation of the legal relations in question; the development of international (economic and cultural) relations; in the East-West relation it should serve the peaceful coexistence, and correspond to the nation's international economic interests, further that it should provide a clear and logical legal set of rules in which the law will not slap itself in the face.

b) However, these principles are rather on a broad line both in case of codification and as to the high-level assistance to the development of practice. Private international law should achieve the point *where it leads to correct solutions in substantive law. Therefore it must penetrate into the world of substantive law, as well as the social, economic, juridico-political, theoretical considerations and factors determining the former: e.g. into the actual material phenomena and each major determinant on which the substantive law regulation is to be based.* This is the only way to provide an answer to our conflicts law problems. Such is the socialist interpretation of PIL justmess *(Gerechtigkeit)*. In the context of private international law the weight and complexity of this requirement will grow. Its weight will grow because in a conflicts law position the impact of various substantive laws must be presumed; this is why it is particularly important for the legislator to create a conflicts law norm enabling the maximum play of the domestic-substantive-law *Gerechtigkeit*. And the complexity will increase, because the domestic substantive-law value system will have to be related to various substantivelaw value system in a comparative analysis before it can be expressed in the projected international private law norm (rule).

Summing up: there can be no intelligent comparative private-law theory unless its theses rely on the substantive law institutions forming its background. Basically private international law is – according to the foregoing – always a comparative substantive private law as well. In the

transnational law conception the substantive law-approach is equally the essential element. Not only because by the comparative law "boom" subsequent to W. W. II. substantive-law research activity contributed to the unfolding of transnational rules (*Langen*, pp. 20–23, *supra*, 7), but essentially because "the aggregation of all those rules..." which the transnational conception is offering are almost exclusively substantive law rules or solutions.

Recently, *e.g.*, in the Hungarian literature the opinion has been emphasized that "let's bring substantive law into private international law!"[34] But that was another thing. This subnstantive-law opinion had been created and has consolidated under the pressure of practical claims. Today this thesis – being dissatisfied with the, for this or that reason, unsatisfactory "services" of conflicts law, suddenly brings in the substantive-law regulations into private international law claiming that all substantive law rules (conventions, domestic laws etc.) which regulate legal relations involving foreign elements directly belong structurally *(systemgemäss)* to the corpus of private international law. Thus, this opinion is not meant to enrich the traditional private international law theory by the underlying or "background" substantive law, it simply wishes to include in the range of private international law also the international substantive law rules arising *besids* the conflict law corpus (all international conventions and agreements concerning international business and other related ralations). This, of course, could be regarded as a more practical question of name-giving or treatment, or as the forecast of the future meaning that the concept and framework of private international law should remain, even when its original content has become nearly extint because everything will be covered by substantive law structures. From the aspect of conflicts law however the *problem is not whether we have incorporated the substantive law into the corpus (branch of law) of private international law or not.* To deliberate on this discussion would lead us too far from our object. One thing is sure: the conflicts law constitutes a relatively particular agregation of rules within the whole, i.e. within the said broader meaning of private international law. As it is: the two are found on different planes. The whole structure of conflicts law shows by its basically different juristic *(sui genereis* juristic) identity a corpus of its own and by this if differs from the substantive law rules applicable to international relations, particularly as it only contains choice of law rules and, therefore, its social content is determined by the domestic social phenomena only in a very indirect way, the alternatingly interfering foreign laws and their respective social content having a substantial effect here; and further the conflicts law possesses a general part, a general theory of norms (Normenlehre) applying to all special norms of the whole structure as, *e.g.* a mathematical coefficient written in front of an algebraic expression applies to all members of this expression. Conflicts law is never applyed together with international substantive law norms (they rather exclude each other) so much that a binding substantive law regulation – provided it refers to the same

legal case – excludes the application of the conflict rule. Therefore, for the sake of clarity: the term "private international law" in this paper shall mean: conflicts law.

The problem is not that we have failed to incorporate the international substantive law regulations into the branch of private international law but rather that we failed to bring in that substantive law whose answers we are seeking – and finding – through the conflicts law decision. We did not go close enough to reality. In order to be socially useful and correct also by standards of the theory of science, a theory of comparative private international law should be defendable also against the former objection, i.e. it must be reality-oriented through being substantive-law-oriented.

21. After these two – we hope, undisputable – premises let us now see what a right theory – a right theoretical approach – can consists of in private international law.

The postulation of a right theory, the clear definition of its conceptual requirements are frequently the preconditions for the correct and expedient approach of truth and of the development of science and practice. The progress of natural sciences has taught us again – so *Niels Bohr* writes in his "Atomic physics and Human Cognition" that the kernel of progress in science often lies just in the correct choice of the theory, i.e. the definicions.[35] I believe that this statement holds true also for the social sciences including private international law. A supposedly right theory is tried to be developed here along the following questions: what should be the basis of a realistic theory ? (*infra*, 22); how to reach its completeness ? (*infra*, 23); is it possible to find a complete realistic theory in comparative private international law ? (*infra*, 24); what is possible and what follows therefrom ? (*infra*, 25 – 27).

22. The starting point of every theory – being a hiarchized system of right or true theses – is that *its foundation requires*, first of all, that its individual theses (perceptions, judgements) be *justified*, *be consolidated as objective truths* (verification). This applies to comparative private international law as well.

a) One of the variants of this vertification process is the axiomatic procedure. However, in private international law (as indeed in any branch of law) such an axiomatic theory or approach would hardly bring any useful result. How does the axiomatic approach proceed ? Starting from basic concepts, general or presumably right theses, or axioms it develops these according to the strict rules of logics. The criterion of "trueness" bears here no direct relation to reality but only means a logically closed cycle. For instance the "correctness" of the four rules of arithmetics can be seen also by sheer logic. In order to believe that 3 times 2 is 6 we do not have to perform 100 tests with 3×2 apples in order to verify that at the end we always get a total of 6 apples. Such an axiomatic approach will graduate into a theory when certain fundamentals are processed by deduction whereby a totality of principles deduced through impeccable lo-

gics are obtained – forming, as they will, a kind of hierrarchical system. Such theories are known – justifiedly – in mathematics, logic, certain branches of economics where mathematics play a decisive role. Such theories are present and sometimes overwhelming (known as the various *leges* and other formulae) in private international law too, but in my opinion no longer justifiedly. Of course: principles, axioms and logics do play an important role in law. However, ultimately, when we have to decide, which thesis is "true", what is the "correct" solution we can no longer resort to pure logical axioms but have to rely on social, economic, moral or other value judgements. Even *Kelsen* who had built a theory on the formalistic-logical approach of law, will stress that "the law, the legal rule is a social phenomenon and not a logical category".[36] The same has been emphasized by *Holmes* much earlier when he said, that "the life of the law has not been logic; it has been experience".[36/a]

b) The other road of verification: in private international law nothing but verification based on reality – as basic criterion – has an intelligent function. First of all because legal science is a reality oriented science (eine *Realwissenschaft)* in which "right" and "true" can be measured only against reality, i.e. whether they correspond to the complex socio-economic and material relations – in general to the laws and tendencies of social evolution. This will remain true even if we observe that the reality justifying the "rightness" of the "truth" of a particular phenomenon may also be a definite legal principle generally adopted by human development. Such a principle can be, *e.g.*, that men are (or should be) equal and all discriminitaon by race, nation or religion is unlawful; or that in a socialist economy the overwhelming majority of the means of production is in social ownership; or that the economic organs of the state are not identical with the state itself; or such generally accepted legal principles which are the common legal heritage of humanity, as for instance *nullum crimen sine lege.*

Even in physics (which can be formulated in the language of mathematics) the verificatory role of experience is a decisive one. Einstein himself, who had operated with plenty of physical-mathematical formulae and wrote down, with the intuition of a genius, his famous formula $E = m \cdot c^2$ at a time when this could not be proven by experience or tests, has often underlined the overwhelming role of experience. Physics is a logical system. This logical system – he wrote – could not be distilled directly from experience by inductive methods. Nevertheless, the rightness of the rules of physics (as a logical system) were exclusively based on the fact that its deduced principles are proven by experience.[37]

This is even more so in jurisprudence. There can be no really right theory except it consists of assumptions reflecting socio-economic, material and related relationships, and their development – as the reality, a theory which consists of the totality of principles drawn from realities, empirical processes and general human heritage, including the interconnections of all these as well as the systematical description of the laws materializing in the empirical process – transposed into norms.

What does this mean in private international law – and maybe in a general sense too? Approximately this:

1. One should define the possible types of legal conflicts to which the *droit des conflicts des lois* provides the rules of the solution. At this point usually no mistake creeps in yet. 2. In the range of the former one must go as far as the substantive law relations. 3. Next, one must examine the actual economic, social or other relation being at the base of the former, including the actual material process evolving therein. For instance, in the range of liability for unlawfully caused damages one should analyse the shift in the pecuniary positions after the damage incurred and the indemnity paid, the effect of other material conditions (e.g. insurance) on the victim of the damage and the person having caused it (the tortfeasor). One must ascertain whether the tortfeasor is left to his own resources in supporting the damage or whether he is backed by a great material power owing to a big productive capacity, or to a big insurance company, in which case he may logically easily bear the financial consequences of legal norms of a higher level than by his own financial sources only. One must further examine how great is the actual preventive force of individualized liability within the range of compensation. 4. By a comparative legal analysis one should determine the kind of solutions, offered by other, potentially applicable, systems of norms (as postulate of the former point 3.). In this comparative law procedure all those problems are to be cleared which at *Langen* started with the language and interpretation problems and ended with a thorough comparative analysis and a binominal rule us the endproduct (*supra*, II). 5. Examine the possible alternatives of regulation – in other words the possible conflict rules. 6. Examine the possible consequences of the application of each. 7. Analyse and describe considerations (e.g. foreign models, legislative method aiming at simplicity or differentiation etc.) which under the given conditions may serve as points of view at the creation of the choice of law norm.

So far the reality: i.e. the world of statements capable of almost indisputed verification. Let us call this the A-sphere. Next comes the decision: i.e. the expressing of the international private law rule or principle. Let us call this the B-sphere. As it is, here we encounter the aspects which can be verified hardly or not at all, including the tenets and beliefs of legal policy, their logical interconnection; viz. all elements which are part of the decision b e y o n d the fact that the person pronouncing the rule or principle is aware of the verified statements of the A-sphere *with a conclusion indicating an optimum solution emanating from the A-sphere.* The criteria of the decision belong to the A-sphere only in part, while the two spheres are linked and A-sphere has active influence on B-sphere. However, in the B-process several variable, subjective and voluntarist elements (not necessarily in the negative sense) are playing a role which, in themselves, are also real factors. For instance, in the range of contracts the opinion of what constitutes the country's economic interest; certain generally accepted organizational principles in case of corporations; a

greater or lesser validation of the individual and general prevention in case of tort liability on the one hand or greater reliance on compensation by insurance on the other; efforts to keep Hungarian citizens domiciled abroad under the rule of Hungarian law in cases affecting the personal status, etc.

From the relatively own standing of spheres A and B at least three exigencies can be derived. First: when creating a principle or a rule of private international law – whether by a theoretician as an indication for a rule, a judge, or a legislator – one must always relaize in which sphere one moves. Second: in sphere-A one must always strive to clear the situation through well-verified findings. Third: in the process-B – i.e. at the decision – the optimum solutions deriving from the A-sphere should have an overwhelming role.

This, the comprehensive formula of the considerations outlined above, is what I would call a theoretically justified and practically reasonable – i. e. useful – starting point to the theory in private international law.

23. A reality oriented legal science theory – i.e. a theoretical approach adjusted to the demands of reality – may of course achieve *different degrees of completeness.* This degree will depend on *a)* how far it has been able to verify the elements of A-sphere; *b)* how far and how exactly one has been able to formulate the individual theses, and *c)* whether the theses have developed into a coherent differentiated system showing a hierarchical sequence (i.e. general and specific laws).

Query: *How far has the theory or science of comparative private international law progressed within this formula?* In order to give a reliable answer one should survey at least the principal theoretical concepts and statements under the said aspect. It is impossible to undertake this task here. Mainly, because we would be confronted with the said theoretical requirement, i.e. that the statements were to be verified. And to analyse all possible theoretical conceptions under this expections needed a voluminous book. However, I would venture to say that there is hardly a theory conforming to the parameters of our formula. There is hardly one, because – as far as I know – the conscious demand for the elaboration of a theory which would correspond to the outlined requirements, has not yet arisen in such a "formulated" shape. Of course, various elements of the former concepts or theoretical approaches, as well as the codifications of private international law will fit into the said system of requirements in many respects. The several connecting factors being well-formulated theses of certain solutions will also fit in the formula. Similarly, in the same line: before taking actual decisions or declaring theses often the basic realities consisting of the economic and transaction relations have been well covered. And than it has to be emphasized that the transnational law adjudication process and the transnational principles developed by *Langen* (*supra*, 8), especially if combined with the specific principles of private transnational law of Ehrenzweig (*supra*, 15.1) meet quite a number of the requirements of this comparative law synthesis

theory. But there are still not an *ex post facto* projection of it. *Ehrenzweig's* theory because it is very limited to that "narrow compass" and does not go sufficiently behind the legal forms into the social and economic background of the laws in question. *Langen's* theory because it too shares the lastly mentional flaw and because it anticipates the "aggregation of all those rules..." as a corpus of a transnational branch of law.

Accordingly, we may believe that there is no such complete theory which has been conceived under the banner of the said requirements, no complete theory where the respective elements of spheres A and B were consciously separated. Consequently the said requirements were not duly taken into consideration in the formulation of the individual theses and, thus, the level of the said riper structure could not be reached.

24. The question now is *whether such a structural theory is at all possible in conparative private international law?* The question is intriguing because if such is not possible, then – following the foregoing – there cannot exist a reasonable, i.e. practically useful, *comprehensive* theory of private international law. Since the test has not yet been carried through, the question cannot be answered for the time being. However, I would venture that *no such comprehensive theory is possible*, at least not at any higher degree of maturity. The three criteria of a mature, comprehensive theory can only be met approximately in comparative private international law.

The difficulties will begin as early as in the verification process of A-sphere. Let us just reflect whatever can and should be verified there. Among others: the actual material processes underying the substantive law relations (such macro- and mikrostructural elements of a given phenomenon the like of which I mentioned by way of the example of liability); the objective nature of the said material processes. So far so good, there is no theoretical obstacle. But it also should be verified: how many kinds of substantive legal regulations there exist? What do they consist of actually? Since thereon will depend the decision belonging in the B-sphere on what kind of applicable law should be prescribed by the legislator or should be indicated by legal science. In principle this is still possible though in practice it would amount to an enormous undertaking. However, even in principle it would be possible approximately only to verify in A-sphere (for any major institution of the private international law), the consequences of the application of a given, recommended conflict rule. This would be difficult even in principle, because even if I know the substantive law systems in a comparative processing, even if I know the underlying economic and other material process, and also the alternatives of conflicts law regulations – one factor is almost impossible to calculate. Namely, what and how many substantive law systems will enter the picture of a *concrete* legal dispute depending on the contingency sequence of events of a concrete case; what can not be foreseen are those many variations of *rendezvous*-s of the existing more than hundred legal systems, because these *rendezvous*-s may accur in a very wide a range depending on that contigency whether the man I am hitting in a car accident was my own national or a foreigner, wheter be was a German, or an

American, or a Russian, etc., wheter I caused the damage 100 meters beyond or within the Austrian border etc. If I take hundred legal systems, the number of their possible meeting variations amounts to power "x" of these hundred systems. What flows from each possible substantive law system – that much can bee verified. However, it would be impossible, as demonstrated, to pronounce with a *general* validity in international private law, what in a given *ad hoc* decision situation the actual consequence will be when in the said meeting-variations the substantive law systems are being connected by fixed conflict rule. This situation may be even more complicated by the varying formulation of the prefixed conflict rule, for example by the circumstance that the conflict rule, under considerations derived from B-sphere (e.g. the desirable aspects of legal policy), may be a rigid or a flexible conflict norm.

Even a computer could hardly tell us *what the actual solution will be in general and in each actual case*. Simply because there is a constant unknown in the equation: namely that the number of variants of conflicts of legal systems depends on an inforseeable contingency. This is the stituation is in the verification process which would be one of the criteria of a possible general theory.

As regards the second criterion – the exact fromalization of the theses – there are also difficulties. There are of course many theses and maybe even more could be defined through an approximative verification process. The problem is, however: how do these theses relate to the more differenciated reality, i.e. the A-sphere. The theses we mean are e.g. the various connecting factors, or other general rules of the private international law like the rule of the "ordre public" (public policy), or characterization. Norms are necessarily rigid, while reality is constantly changing; since after the lapse of a certain time the reality will no longer be one of their criterion, the norms will start an independent life, bound to be partly alienated from reality and thus partially losing their value – even for the theory. They may become outright disorientating.

The third criterion consists of the hierarchial and structural system of the well-formalized theses of differing levels. Obviously, the perfection of the latter will be questionable when the situation has been questionable already in respect of the first two basic criteria as elements of a comprehensive theory. All these somewhat discouraging conclusions will apply even more to entire branches of substantive law or to the comparison of entire legal systems as such respectively.

Well, this may seem rather dsappointing. However science cannot refuse to try to express truth without illusions. *Ihering*'s much-quoted phrase applies here, according to which: Looking for a uniform system of norms in law which would have similar or identical validity everywhere is tantamount to looking for the philosopher's stone, while it was never the philosophers but the fools who set out in search of it.[38]

25. Still the matter is not quite so hopeless as it would seem at first sight. Despite the above defined requirements it cannot be disputed that the comparative law activity does have a scientific character, and in

certain fields it does have the possibility of developing into a theory. On the contrary: in this reality oriented legal science approach the general legal comparison and concrete theoretical constructions may deserve very high points:

a) As regards comparative law in general, viz. the comparison of entire legal branches, systems, types: here the scientific advantage lies in those values which have been listed above under the first conclusion of the realistic comparative law conceptions combined (*supra*, 16b, 171).

b) However, we are more interested in knowing the actual impact of the said theory on comparative private international law. I take the liberty of anticipating the answers – two conclusions. One is the requirement of the reality oriented legal science approach (*infra*, 26) in general in private international law. The second is the possibility of *verifiable theoretical constructions* particularly in the field of concrete legal institutions (*infra*, 27). More precisely this means:

26. Even if at present there is no *comprehensive* theory in private international law meeting the said requirements and its very creation is doubtful: does it follow therefrom that we have to give up the ventured conception also ? Even when we cannot construct a comprehensive theory which would fill every nook and corner, *it does not follow therefrom that we should not and could not make efforts to create conflict rules governed by the said theoretical approach.*

This is obvious not only on practical considerations but also from the outlined theoretical formula. A reality oriented legal science theory can, namely, be an approximating one or may have, partly, a hypothetical character. For one: a theory will never jump out from somebody's brain like Pallas Athene from Zeus' head, but is rather due to development. Secondly: even an undeveloped theory may provide a concept which can be utilized directly. In case of a hypothetical or approximating theory however, we have to be constantly aware of this fact and should not pretend that we have a perfect theory. We must always keep count of the fact that certain elements of our theory cannot be verified; that certain statements cannot be quite exactly proven but cannot disproved either; however, we can assume that our statements will be proven later; or else that a formalized thesis is based on uncertain suppositions etc.

Two conclusions may be drawn from the foregoing. *The first* is that – with the said corrections – the reality oriented legal science *approach* does have a "verified" basis, further that, whereever possible, we must strive at verified theses and reject the axiomatic approach.

The other: since concerning most conflict norms it is impossible to give all-round verified and generally valid norms for every contingency which would be always uniform and give optimum result from the combination of spheres A and B – therefore in legislative law-making one should strive at making flexible rules. Codification (in general: the theoretical or normative answer provided for each problem) will be on the right path when it enables differentiation, viz. realistic answers even in a sphere where the real elements are already individual and particular and

therefore represent an actual variant of the possible multiplicity. This means that the legislator during codification should strive at delimiting only the major framework of the individual institutions by norms. The judge might be given a slightly wider "filling" role than – say – in case of the rules of the Civil Code.

This should be accepted as natural. One should rely on the judge's getting the legal-political principles prevail in the wider framework given to him by an upto-date drafting of flexible conflicts law norms. Otherwise – by prefixed rigid rules – also on the field of obligations the judge will be blocked in his efforts to come as close as possible to the forum's policy and substantive value-judgement, *i.e.* the legislator would act against its own interests too.

If in the past, when *e.g.* in Hungary the conflicts law codification was lacking, we relied on the judge totally now we most not fear that he will be no good except to formally implement rigid rules. We have no doubt that the judge will be increasingly fit – both in interpretation and in creating supplementary special norms- to move in the world of realities and thus approach the optimum solution according to the above-outlined requirements.

27. In expounding the theory and its limits I have repeatedly stressed that the elaboration of a *comprehensive* theory was doubtful in comparative international private law: *i.e.* for its entirety. Also I mentioned that the same went, very probably and *mutatis mutandis*, also for civil law and other branches as well. However, particular parts and instututions of private law supposedly come under another aspect.

Let us recall: what was the main problem which jeopardized the possibility of a comprehensive theory for private international law as whole ? It was the fact that, owing to the random chance (which is being created by contingent fact situation and the prevalence of nearly void conflict rules as regards substantive law values) we cannot foresee the substantive law which will ultimately govern the case. In other words, we are unable to verify adequately decided recommendations as a theoretical thesis; therefore it is hard or impossible to cast them into a uniform exact formulation, and therefore the systemation of these forms is also doubtful. This, then, is the *punctum saliens* from the theoretical point of view. But what is hard or impossible for the private international law as a a whole, nevertheless with the possibilities as outlined above (*supra*, 26), *that may be possible and feasible as to concrete institutions* of this branch of law. From the just stated *punctum saliens* follows namely: if there were such concrete social, life and transaction relations whose internal substantive law regulation would be shaped by identical or similar determinats, objectively fit to create similar substantive legal institutions beyond national frontiers and beyond the borders of legal sysem – *then* the proposed private international law norms could also be verified against a less ambigous substantive law background, and this under the conditions of more homogeneous economic-technological processes leading to harmonizing or homogeneous snbstantive law regulation. If namely,

by virtue of essentially identic or similar socio-economic determinanls a substantive law *harmony(Einklang)* is being produced and witnessed, then the following two conclusions seem justified. For one: substantive law comparative syntheses are offering themselves. And the other conclusion: in the case of a highly harmonizing substantive law situation the verification of a comparative private international law thesis is also evident, because whatever the mentioned concrete *rendez-vous* variation of the different legal systems vill be, it is still the meeting of essentially identical or harmonizing substantive law solutions; and under this condition a well-defined substantive law oriented conflict rule can be adequately indicated by the actual comparative law analyses and synthesis following therefrom.

Does comparative civil law – and through it: comparative private international law – have such fields or such concrete institutions ? No one disputes that there exist such within the similar types of law. So much that formed into a system (a code) they become common law. Such is *e.g.* the uniform law of the CMEA countries on foreign trade contracts called the General Conditions of Delivery.

Or sea the *Bustamante Code* of the Latin American countries, or the even more developped and important community law conventious and other common regulations within the EEC.

There are any "common laws", i.e. conventions and other forms throghout the world within legal orbits of the same or similar social, economic and legal structure. These are really comparative law syntheses in the mentioned sense – the demonstration and/or the product of them in the family of the same type of law, while under "type of law" legal systems with the same (*e.g.* socialist or capitalist) economic-social structure are understood. *Ehrenzweig* and *Langen* in their transnational conceptions showed a substantial community of regulations concerning various concrete legal institutions (general and specific principles) developing in the harmonizing legal practice in the discussed concrete questions, as we could see, with regard to the analized developed capitalist countries (supra, 7–8, 15.1). From the socialist legal orbit too illustrations could be brought to show that in various concrete legal institutions substantial similarity or harmony developed and can be witnessed also beyond the sphere of formal unified law like the mentioned General Conditions of Delivery of Goods of the CMEA Countries.

Comparative law syntheses and theories are, no doubt, viable and working within the different legal orbits of the same type of law, either as to single rules or solution-indications for one particular question or as to more comprehensive structures with a number of general and special norms hierarchysed into a closed system as a convention normally is.

But – coming now to the heart of the matter – are such syntheses, in supposed concrete fields of course, viable also between East and West, *i.e.* between socialist and non-socialist laws, given the circumstance that law is a reflection and superstructure of the underlying economic and soacial system and these systems are, socialist and capitalist systems, in

their essence antagonistic phenomena? How then common syntheses? This basic principle of marxist legal philosophy was always the starting point when any attempt to approach towards comparative law East-West syntheses was rejected. As it turned out, however, this was a too simplified interpretation of the said principle: the application of a principle, characteristic of entire legal systems as a whole, without any differentiation also to any possible particular rule functioning in the legal systems in question. The statement namely that *in concrete fields comparative law synthesis theories are possible also in East-West relations is evidenced by facts and also supported by theoretical considerations under the said requirements.*

a) A few *facts* by way of example. The 1962 conference in London on "The Sources of the Law of International Trade" was organized "with special reference to East-West trade" with attendence by persons and papers from socialist countries.[39] Next, in 1964 there took place in New York the colloquy on the "Unification of the Law Governing International Sales of Goods". At the latter, socialist writers contributed valuable papers on the comparative analysis of The General Conditions of Delivery, the U. S. Uniform Commercial Code, The Hague Treaty on the Sales of Goods and the Czechoslovak Code of Foreign Commerce.[40] Without admitting an East-West comparative theoretical synthesis one could not imagine the affiliation of socialist countries to civil law or private-law treaties like the various agreements on carriage of goods by ship, by rail, by road or by air; or the Unions relating to the protection of intellectual property; the agreements covering cheque and bill of exchange; socialist participation in the preparation of universal legal documents like the Hague Conventions on the Uniform Law of International Sales; the draft treaties on the peaceful uses of the outer space; not to mention the UNCITRAL drafts: as a matter of fact the theoretical concept of the entire latter institution had originated from a socialist country, namely from Hungary. Or let us take an even more evident example, a symbiosis of regulations of socialist and nonsocialist origin: The General Conditions of Delivery of Goods of the CMEA countries has a chapter, namely the transport regulations, which incorporate many of the *Incoterms* rules into the corpus of a socialist commercial code of international rule. Twice two is four: all this could not have been done without the tacit submitting that the conditions of a comparative legal synthesis were given also in East-West relations in these fields.

b) In order to theoretically justify our thesis we might cite the following considerations. The regulations referred to as examples (or parts thereof) are such institutions in law where the national substantive law systems are to a high extent homogeneous; they are the projection of graual harmonization tendencies within the developed national legal systems which, although formally independently, come all very close to the desired theoretical optimum solution. This fact (i.e. the unifying effect of international trade) is rather generally admitted. *Ehrenzweig* sees its possibility in the range of the concrete institutions of a *Law Merchant*

(Vermögensverkehrsrecht) i.e. the property-commercial transactions ("economic relations common to all laws"); thus recognizing the possibility of comparative law syntheses. He even adds that this was the resurrection of the ancient age's *ius gentium:* the *ius gentium* had first been the law of the foreign merchants but subsequently it became universal for all participants of foreign trade.[41] Others believe, as already discussed in this paper too (*supra*, 5,12), that there exists a general *lex mercatoria (Recht des Welthandels)* which finds itself beyond national laws and legislations, consisting of various trade usages, custom, general conditions of sale, so-called legal principles generally accepted among the civilized nations etc. cumulating, as it seems, in a worldwide *preater legem* legal substance.[42] Although *lex mercatoria* is far from being a general recipe, yet it cannot be denied that the international and national legislations and legal practice relating to international trade are showing a strong harmonization even on basic dogmatic questions. Many will say this and go evem further. "The systems of the laws of obligations are, at a certain level, mutually interchangeable – as *e.g. Vischer* says – therefore one may, within certain limits, leave it to the parties' choice which law they want to apply for their legal relations."[43] While this is a little bit beyond the facts (particularly when applying this to the entirety of the system of the law of obligations) it is nevertheless indicative of a strong tendency in Western jurisprudence and also characteristic of the actual trend of legal development. It is well known for instance, that before drafting certain socialist foreign trade enactments, which were not directly meant to apply to the transactions of the CMEA, also the solutions ofcapitalist commercial law were taken as models.[44]

We could continue this survey of the literature. It would be for instance possible to prove the generally admitted thesis that, in a given field of law, or in the field of private law, the scientific value of legal comparison becomes manifest in the domain of the actual legal institutions.[45] However, in order to prove the theoretical justification and value of comparative law syntheses we must go one step deeper. This consists in the following. We have the outlined phenomenon: on the one hand the harmonization oriented various opinions in legal writings on the other hand the circumstance that in case of certain legal institutions the possibility of identical legal solutions hovers at everybody's hand's reach (i.e. a legal thesis – if you please: theoretical thesis extrapolated from various legal systems and generally accepted). The essence of this phenomenon can be expressed in that objective fact, that quite a set of institutions of the private law of modern traffic and technical relations, the *how* of their regulation is approximately similarly determined by the given definite level of the productive forces; *in such relations the decisive role of the productive forces is of primary character*, besides the production relations which, generally, transfer the command of the procuctive forces in differing (socialist or non-socialist) directions and forms conditioned just by these differing (socialist or non-socialist) production relations. In such cases the deviations of this origin are of minor importance – the equally

developed productive forces and production processes result in equal or similar legal regulations. This phenomenon is the ultimate source of the theoretical justification of the community of regulations and the viability of East-West sintheses with regord to given concrete institutions. This, reinforced by the interest of international commerce, becomes manifest in the growth of objective harmonizing tendencies in the law, in international legislation and literature. By this here we have arrived to the basis fo the said reality-oriented legal science theory, having arrived to the world of verifiable theses (statements, comparative law indications relating to positive law). The theses are verifiable because the fundamental material process and conditions, i.e. the factors primarily determining the law in the given field, can be grasped even though the conflict rules may send us to look for the background relations of substantive law systems of X-quantity; the latter will, namely, be objectively similar – apart from certain elements of the production relations and national traditions which, however, are not decisive in this point of view. This leads us to the possibility of reaching *the second step* which consists of casting the verified statements or theses in exact forms serving then codification, legal practice or more clearness in the harmonizing process of legal thinking. Moreover in case of a major institution the derived theses can be developed into a hierarchical order of general and particular rules, and through this we reach a living legal formula corresponding to the developed form of theory elaborated as above. Such is, in most cases, a private international law treaty, e.g. The CMEA General Conditions of Delivery of Goods, the Hague Convention on the Law of Sales, or The Hague Treaty on Conflict Rules; but any other agreement – apart from a few exceptions.

The problem of how concrete theoretical theses in the sense of the foregoing, can be actually derived in respect of a *concrete* legal institution, should now be demonstrated on some concrete examples – also in order to verify this comparative private law synthesis theory as a whole. This has been done in the said original Hungarian formulation of this theory concerning such private international law institutions as the *party autonomy, renvoi, reciprocity, juristic persons, liability* for *damages*.[46] And others could be ventured. But to deliberate on all these here would amount to a book almost, and that would go beyond the framework of this study. So I conclude with *two observations*.

a) Comparative law syntheses as outlined, syntheses of theoretical value cannot be created in those legal sectors and for those legal institutions which are directly expressing (regulating, protecting, promoting) the differing constitutional, economic and social relations of countries with different social systems. In these cases, namely, the different-type national legal systems will be governed primarily not by the harmonization trend motivated by means of production of the same level of development, but rather by the differences motivated by the different economic and social relations.

b) However, in those said fields, where a comparative law synthesis of theoretical value is possible, the theoretical justification and soundness

of such synthesis will stand. It will stand despite the fact that the self-same theoretical thesis (the identical uniform norm, institution, or norm suggested to unification) may or will fulfil different functions in countries with diverging social and political systems.

FOOTNOTES

[1] *Eugen Langen: Transnational Commercial Law.* Sijthoff, Leiden 1973. XI, 280 pp. As to EHRENZWEIG's study see note 5 *infra.*

[1/a] The book "Transnational Legal Problems" of *H. J. Steiner* and *D. F. Vagts* (Foundation Press, Mineola, N. Y., 1968, LIV, 1280 p.) does not fall in this line, because in spite of its "transnational" title they used this title only "to include all law which regulates actions or events that transcend national frontiers" and the book was not meant to "develop a coherent concept of a coherent transnational legal system" (p. XI – XII). As to new orientations in private international law more slosely see, *e. g.* the following works: *C. Joerges: Zum Funktionswandel des Kollisionsrechts.* Berlin-Tübingen 1971, XVI, 186. p.; *P. H. Neuhaus: Neue Wege im europäischen internationalen Prioatrecht? Rabelsz,* 35(1971), 401 – 428. p.; *Cavers: Contemporary Conflicts Law in American Perspectives.* Recueil des Cours, 131 (1970 – III.), 77 – 308. p.; *K. Siehr: Ehrenzweigs lex-fori-Theorie und ihre Bedeutung für das amerikanische und deutsche Kollisionsrecht.* Rabelsz, 34(1970), 585 – 635. p.; *P. M. Gutzwiller: Von Ziel und Methode des IPR.* Schweizerisches Jahrbuch des Internationalen Rechts, 25/1968), 161 – 196. p.; *A. F. Schnitzer: Betrachtungen zur Gegenwart und Zukunft des internationalen Privatrechts.* Rabelsz, 38(1974), 317 – 343. p.; *K. Zweigert: Zur Armut des IPR an sozialen Werten.* Rabelsz, 37(1973), 435 – 452. p.; *Graveson: Comparative Aspects of General Principles of Private International Law.* Recueil des Cours, 109 (1963 – II.), 3 – 164. p.; *F. K. Juenger: Möglichkeiten einer* Neuorientierung des internationalen Privatrechts. Neue Juristische Wochenschrift, 26(1973) vol. No. 35, 1521 – 1926. p.; *A. A. Ehrenzweig's* work in note 6 *infra; F. Madl's* article in note 4 *infra.*

[2] *F. Madl: Az összehasonlító nemzetközi magánjog elmélete. Kisérlet magyarázatokkal. (Theory of Comparative Private International Law. An Experiment with Explanations).* Állam- és Jogtudomány, Vol. 1972. No. 3. pp. 485 et sequ.

[3] I thought to see at least one such a peak and think to have climbed it somehow, see thereto a summary in the IV. part *infra* of this article.

[4] *F. Madl: Struggle with Reality in Private International Law. Evolution of the Theory of Private International Law and its Curtreat Trends.* Acta Juridica, Vol. XI. (1969), No. 1 – 3, pp. 151 – 185.

[5] *A. A. Ehrenzweig: Specific Principles of Private Transnational Law.* Extract from the "Recueil des Cours", Vol. II, 1968, Academy of International Law, Ed. Sijthoff, Leiden 1968, 204 p., in this work Ehrenzweig constructed this organization: Tentative thesis: National Conceptions of National Law, Antithesis: "International" Preconceptions of Superlaws, Synthesis: Postconceptions of Transnational Law. I shall come back to the role of this work later in the scope of the *Realistic Theories Combined* of this article.

[6] *A. A. Ehrenzweig: Private International Law. A Comparative Treatise on American International Conflicts, Including the Law of Amiralty.* Val. I., General Part. Sejthoff – Oceana, Leiden – Dobbs Ferry N. Y. 1967, 293 p, Vol. II. Special Part (with E. JAYME), the same publishers, 1973, XIX, 338 p.

[7] See for example his *American – Greek Private International Law* (1975, with *Fragistas and Yiannopoulus), or his American – Japaneese Private International Law* 1964, with *Ikehara* and *Jensen),* his lectures and reports on so many international fora of comparative law so also in the International Encyclopedia of Comparative Law, his efforts to bring the flavour of comparative law also into the American legal education process, into the teaching curriculum of his University at Berkeley, California, attracting so many scholars (also form socialist countries, as *e.g.* I had the chance to teach with him at Berkeley a course on comparative jurisprudence).

[8] *Formation of Contracts. A Study of the Common Core of Legal Systems.* Conducted under the Auspicies of General Principles of Law Project of the Cornell Law School;

General Editor: R. B. SCHLESINGER, Oceana-Stevens, Dobbs Ferry NY – London, 1968. Vol. I., XVII, 910, Vol. II. XIV, 911 – 1727 p.

[9] Let me just mention two examples. One is the *Larkin* case decided by the supreme Court of California, 1966. (52 Cal. Rptr. 441, 416 P. 2d 473) in which after a thorough comparative analysis of the relevant US and Sowiet laws, practice, and jurisprudence the reciprocity in succession cases has been recognized. The other is the *Greenspan v. Slate case* decided by the Supreme Court of New Jersey, 1953 (12 N. J. 426, 97 A. 2d 390) in which the court reached its judgement in applying the comparative method to domestic problems in a children's support dispute.

[10] "... Next I am going to deduct from the compiled constitutions that which singular states and singular constitutions offer us, what deteriorates them, why is the one state governed well, the other badly. If this has been analysed, we shall sooner and easier recognize *which is the best constitution*, how it is organized, what laws and morals prevail in it." See: ARISTOTLE: *Nicomachean Ethics*, Book X., chapter lo, last paragraph (P. 1181b according to the Bekker's 1931 edition of the Prussian Academy). According to the reference of subsequent fragments Aristotle went through the comparative analysis of 158 constitutions. A recent American edition refers to the survey of 58 constituins only: ARISTOTLE: *The Athenian Constitution*. The Endemian Ethics. On Virtues and Vices. Harvard Univ. Press, Cambridge, Mass. 1952. p. 2.

[11] *E. g. L. Szalay* published a series of comparative law studies also as part of an optimum codification, see his collected works: *Publicistai dolgozatok (Studies in Codification)*. Vol. I – II. Heckenast, Pest, 1847.

[12] The conflicts law has been codified in the last years *e.g.* in Poland, Czechoslovakia, USSR, GDR; the codification is under way in Italy, and an EEC draft on the law of obligations also has been completed very recently; Hungary's private international Law Code is also waiting the Parliament reading.

[13] If we look into the details of this principle and look up the sources Langen has cited but not characterized in footnote 80 p. 230 (for example SCHWARZENBERGER'S Foreign Investment and International Law) or other sources (for example the ILA conference discussions in this subjectmatter), we are faced with highly neuralgic and political opinions and clashes with one principle, if any, namely: that there is no consensus to the prohibition of expropriation without compensation as a general, "well-tried", or for acceptance by other criteria suggested principle.

[14] "Formulated or nonformulated but settled (true) rule" *A. A. Ehrenzweig, Private International Law*, (Vol. I., 1967).

[15] "Only where our quest for a formulated or nonformulated (true) rule of choice has failed are we entitled and called on to offer new suggestions based on conflicts theories developed *a priori* independently from positive precepts..., it is within that narrow compass that I have advanced my own 'theory'" – and for *Ehrenzweig* this theory was the forum-approach. See *Ehrenzweig, op. cit.*, pp. 90 – 93. To its realistic, I hope, interpretation see:. *F. Madl: Struggle With Reality* (*supra* in the note 4) pp. 166 – 167.

[16] "This book's *lex-fori* approach... I should prefer not call a theory", *Ibid.*, p. 93.

[17] See the bibliographic data *supra* in the note 5.

[18] The summary is based on the book as a whole, but especially on the Part Three *Synthesis: Post-Conceptions of Transnational Law*, (p. 255 et sequ).

[19] *Ibid.*, pp. 257 – 258. A comment: It is true that legal philosophy or comparative law are not a branch of law, but they are disciplines of their own even if not in the same say "independent" manner, but the discussion of this problem would lead us too far.

[20] *E. Rabel: The Conflicts of Law*. Vol. I. (Ann Arbor-Chicago, pp. XXII, XXIII.

[21] *Ibid.*, p. XXIII.

[22] See thereto *Madl: Struggle with Reality...*, (*supra*, note 4).

[23] *E. Rabel: Das Recht des Verkaufes* (Berlin 1957, Reprint), p. 36. To the general unification of law and comparative law see especially his article: *On Institutes for Comparative Law*, Columbia L. R. 1947 p. 227 et sequ., also published in *Gesammelte Aufsätze*. Vol. III. p. 235 et sequ.

[24] *E. Rabel: The Conflicts of Law*. Val. I. p. 94.

[25] The mantioned tendency became evident first more comprehensively, in the discussions of the International (East-West) Round-Table Conference held in Budapest

(September 9 – 12, 1969) under the title *Tendencies and Functions of Comparative Law in Contemporary Society*, Acta Juridica, XIII. (1971), pp. 128 – 205.

To the developments in the socialist legal writing see *Madl: Az összehasonlító nemzetközi magánjog elmélete. Kisérlet magyarázatokkal. (A Theory of Comparative Private International Law. An Experiment with Explanations)* in Állam- és Jogtudomány, Vol. XV (1972), No. 3. p. 485 et sequ.

[26] *I. Szabó: A jogösszehasonlítás szocialista elmélete.* Publishing House of the Hungarian Academy of Sciences, Budapest, 1975, 241 p.

[27] *Langen* too said, however, "another outlook and approach as figuring in the transnational conception be needed in touching upon the question of whether, and to what extent, a comunity of transnational law can be said to exist between the legal systems of the West and those of the socialist States" (p. 1). And than here he stays. *Ehrenzweig* makes more research-undertakings to socialist law not in his *Private Transnational Law*, but rather in his *Private International Law* (a review on these efforts in *supra*, note 4. *Mádl: Struggle with* Reality... p. 174 et sequ. in section "Western Appraisal of Certain Theses of Socialist Law").

[28] Quoted in *W. Heisenberg: Der Teil und* das *Ganze.* München 1969. p. 95.

[29] *W. Heisenberg: The Philosophical Background of Modern Physics.* Encyclopedia Moderna, IX (1974), 28, p. 132.

[30] See the article in the note 2 *supra* and my article formulating the first Hungarian version: *Elméleti megfontolások gyakorlati célra, nemzetközi magánjogi norma alkotásához (Theoretical Considerations for Practical Ends to the Creation of Conflicts Law Norms),* Jogtudományi Közlöny, Vol. 1969.

[31] *V. Peschka: A modern jogfilozófia alapproblémái (The Basic problems of Modern Legal Philosophy)* Gondolat Publishers, Budapest, 1972, p. 12.

[32] *Ibidem*, p. 77.

[33] *Ibidem*, p. 78.

[34] See *e.g. J. Szászy: The Private International Law of the European Peoples' Democracies.* Publishing House of the Hungarian Academy of Sciences, Budapest, 1964, and *M. Világhy: Introduction to Private International Law.* University Textbook Press, Budapest, 1967.

[35] *N. Bohr: Atomic Physics and Human Cognition (in Hung.)* p. 47.

[36] For the elaboration of this problem, resp. *Kelsen's* referred thesis in the Hungarian literature see: *Peschka* op. cit. pp. 42 – 43; in the foreign literature *V. Klug: Die reine Rechtslehre von Hans Kelsen und die formallogische Rechtfertigung der Kritik an dem Pseudoschluss vom Sein auf das Sollen. (*Law, State, and International Legal Order" Essays in Honor of Hans Kelsen, 1964, pp. 153 – 171.

[36/a] *Holmes: The Common Law* (1881). p. 1.

[37] *A. Einstein: Ideas and Opinions. Grown ed. New York* 1960, p. 322.

[38] „Die Idee, dass das Recht im Grunde überall dasselbe sein musste, ist um nichts besser als dass die ärztliche Behandlung bei allen Kranken die gleiche sein müsse – ein Universalrecht für alle Völker und alle Zeiten steht auf einer Linie mit dem Universalrezept für alle Kranken; es ist der ewig zur Suche stehende Stein der Weisen, den in Wirklichkeit nie die Weisen, sondern nur die Toren zu suchen ausgehen können." Quoted in *G. Philips:* Erscheinungsformen zur Methoden der Privatrechts-Vereinheitlichung. A. Metzner Verlag, F/M. – Berlin, 1965, p.7.

[39] *The Sources of the Law of International Trade, with Special Reference to East-West Trade.* Ed. *C. M. Schmitthoff.* Intarnational Association of Legal Science Publication, Stevens and Sons, London 1964, XXVI, 292 p.

[40] *Unification of the Law Governing International Sales of Goods.* The Comparison and Possible Harmonization of National and Regional Unifications. International Association of Legal Science Publication, Dalloz, Paris 1966.

[41] See *A. A. Ehrenzweig: Psychoanalytic Jurisprudence.* Syjthoff – Leiden, Oceana – Dobbs Ferry, NY., 1971., Chapter on comparative law, esp. p. 98.

[42] Next to *Rabel* who had earlier emphasized the birth of a modern lex mercatoria (*E. Rabel: Das Recht des Verkaufes*, Berlin 1957, reprint, p. 36), this concept was particularly expounded by *Schmitthoff:* „Eine der bedeutsamsten Entwicklungen der Nachkriegszeit ist der Wessenswandel im Rechte des Welthandels. Noch vor fünfzig Jahren wurde dieses Rechtsgebiet – jedenfalls von der herrschenden Meinung – in jeder Rechts-

ordnung als Teil des nationalen Systems des Handelsrecht angesehen, obwohl es nie an vereinzelten Stimmen unabhängiger Denker fehlte, die den internationalen Character des Welthandelsrechts betonten. Heute ist die Lage grundlegend verändert. Der internationale, mehr noch: der universelle Character des Welthandelsrechts tritt mehr und mehr in den vordergrund und berechtigt uns, von dem Entstehen einer neuen lex mercatoria zu sprechen" (*C. M. Schmitthoff: Das neue Recht des Welthandels.* Rabels Zeitschrift, 1964, No. 1. p. 45). But reference is contained to the modern *lex mercatoria* also in the manual of *R. David: Les grands systems de droit contemporains* (Dalloz, Paris 1966), p. 10. The development in this regard are going so far that books are published on a globally uniform commercial law. See *e.g. O. C. Giles: Uniform Commercial Law* (Syjthoff, Leiden, 1970); true, this book proves on the strength of sociological surveys that in the national-local practice the conventions, expressive forms of the uniform law of trade, also disintegrate to a large degree; although according to the critique this is remarked mostly in questions of detail (cf. a review by *A. Rehbinder* in Revue de droit Suisse; vol. 90 (1971), pp. 519—520).

[43] „Die Schuldrechtsordnungen sind... gewissermassen auswechselbar und können aus diesem Grunde innerhalb bestimmter Schranken unbedenklich der Wahlfreiheit der Parteien anheimgestellt werden" *F. Fischer: Internationales Vertragsrecht.* Die kollisionsrechtlichen Regeln der Anknüfung bei internationalen Verträgen. Vertrag Stämpfli, Bern 1962, p. 27).

[44] This was explained by *Bystricky*, R. in his lecture held on 11 March 1965 in Budapest at the private International Law Section of the Hungarian Lawyers' Association.

[45] In foreign literature, *e.g.* in the French jurisprudence the clear thesis is worded like this: „Il ne s'agit pas de faire des études compartimentées' de tel ou tel droit; ce qui intéresse sujourd'hui, á une époque d'interprétation réciproque entre États, c'est de comparer les institutions." (*C. Cadere:* Quelques réflexions sur les études de science juridique comparative. Revue Internationale de Droit Comparé, 23. (1971), p. 849): but the generally known venture of the International Encyclopedia of Comparative Law is conceived of in this sense. In the Hungarian literature see *D. Madl's* cited contribution at the 1969 Budapest conference (*supra*, note 25), and the papers: *Gy. Eörsi: A konvergencia problémái a polgári jogban* (Problems of Convergence in Civil Law), Állam- és Jogtudomány, XV (1972), No. 3, p. 397 et sequ. *I. Szabó: Az összehasonlító jog elméleti kérdései* (Theoretical questions of Comparative Law), Állam- és Jogtudomány, XV (1972), No. 2.

[46] See the mentioned article (*supra* note 2), especially its. Chapter III: "The Theory in the Experimental Verification Process".

ZU DEN GRUNDFRAGEN DES INTERNATIONALEN PRIVATRECHTS

Eine rechtsvergleichende Synthese-Theorie versus transnationales Privatrecht

Prof FERENC MADL

In letzter Zeit sind zu einer Neuorientierung des internationalen Privatrechts mehr und mehr neue Wege, Konzeptionen und Theorien erschienen. Der Ausgangspunkt dieser Neuorientierungstendenzen lag, bzw. liegt in dem Umstand, dass das traditionelle internationale Privatrecht den Bedürfnissen der modernen Verhältnissen nicht mehr oder nur sehr schwer entsprechen kann. Eine dieser neuen Orientierungstendenzen ist die Konzeption eines transnationalen Privatrechts, bzw. transnationalen Handelsrechts. Dieser Aufsatz versucht diese letztgenannten Konzeptionen und auch andere Neuorientierungstendenzen umfassend kritisch zu bewerten. Dieser Wertung folgt dann der Versuch, eine rechtsvergleichende Synthese-Theorie. Diese Theorie integriert die realistischen Elemente der Neuorientierungstendenzen, und entwickelt dann die These, dass auf Grund rechtsvergleichender Analysen moderne Norm-Vorschläge zur Entwicklung des internationalen Privatrechts erarbeitet werden können, und dass das die hinsichtlich bestimmter Institutionen auch mit Ost-West Wirkung theoretisch gerechtfertigt werden kann.

К ОСНОВНЫМ ВОПРОСАМ МЕЖДУНАРОДНОГО ЧАСТНОГО ПРАВА

Профессор ФЕРЕНЦ МАДЛ

В последнее время появился ряд новых путей, концепций и теорий относительно нового направления международного частного права. Дело в том, что сегодня уже традиционное международное частное право совсем нет, или только с трудностью соответствует современным условиям. Существующее положение повелок тенденции новых ориентаций. Одной из этих тенденций является концепция транснационального частного права т.е. транснационального торгового права. Настоящая научная работа делает попытку на общую критическую оценку вышеупомянутой концепции и других тенденций новой ориентации. В дальнейшем говорится о возможности выработки теории сравнительного права, интегрирующей реалитические элементы новых тенденций, создающей тезис, по которому на основе анализов относительно сравнительного права могут быть выработаны нормативные предложения для развития международного частного права. Относительно определённых институтов тезис является теоретически основательным и в релации Востока и Запада.